



1-1-1992

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David D. Friedman, *Less Law Than Meets the Eye*, 90 MICH. L. REV. 1444 (1992),
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LESS LAW THAN MEETS THE EYE

*David Friedman**

ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES. By Robert C. Ellickson. Cambridge: Harvard University Press. 1991. Pp. ix, 302. \$39.95.

This book starts with a famous academic parable — Ronald Coase's tale of the farmer and the rancher — intended to explicate the relation between liability rules and land use.¹ Coase asked how the behavior of a farmer and a neighboring rancher would be affected by whether the rancher was responsible for damage done by straying cattle. In one of the first statements of what came to be called the Coase Theorem, he concluded that, as long as the parties could readily bargain with each other over their actions, the legal rule would affect the pattern of side payments — who had to pay what to whom — but not the use of the land.²

Shasta County, California is a patchwork of open range and closed range, designed by the accidents of history to test Coase's conclusion. In open range the legal rule holds the farmer responsible for fencing out straying cattle, while in closed range the rule is that the rancher is responsible for fencing his cattle in. Allowing that real legal rules are somewhat more complicated than academic parables, the situation corresponds almost exactly to Coase's hypothetical.

Robert Ellickson³ looked at what happened in Shasta County, using techniques of investigation modeled on the approach of law-and-society scholars. He used interviews, aerial photographs, and searches of the relevant records to try to discover what actually happened with regard to straying cattle, land use, fence building, and a variety of related issues. He studied an area that included both closed and open range over a period that included one successful and one unsuccessful attempt by residents to persuade the local board of supervisors to convert territory from open to closed. Ellickson's surprising conclusion: Coase was correct in predicting that land use would be unaffected by the legal rule; he was incorrect in predicting that side payments would be affected.

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1. Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 2-8 (1960).

2. RONALD H. COASE, *THE FIRM, THE MARKET, AND THE LAW* 157-85 (1988); Coase, *supra* note 1.

3. Walter E. Meyer Professor of Property & Urban Law, Yale University.

So far as Ellickson could tell, the legal rule determining who was liable when ranchers' cattle strayed onto farmers' land had no effect on the behavior of either ranchers or farmers insofar as it involved cattle straying onto the farmers' land. His observations and interpretations appeared in a series of articles, of which the best known is probably "Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County."⁴ He has now expanded the articles into a book that should be of quite general interest to legal academics and many others. His argument draws on both the law-and-economics and the law-and-society traditions, combining economic analysis, anthropology, sociology, game theory, and a variety of other approaches to understanding human society.⁵ One of his conclusions is that law is very much less important than most of us believe.

Ellickson discovered that interactions in Shasta County between neighbors, with regard to straying cattle and many other things, are controlled not by law but by a system of norms, a private law code unconnected to courts, legislatures, or any other agency of state power. When informed that one of his animals was trespassing, a rancher is expected to apologize, retrieve the animal, and take reasonable precautions to keep it from happening again. If significant damage has been done, the animal's owner is expected to make up for the damage — in one case by helping replant a damaged plot of tomatoes (pp. 61, 235).

The system is self-enforcing. If a rancher consistently lets his animals stray, or fails to offer to make up for significant damages, the victim responds with gossip — spreading the word that the rancher is not behaving in a proper neighborly way. If that fails to work, the victim may transport straying animals far away — imposing significant costs on the owner who has to retrieve them. In extreme cases trespassing animals may even be deliberately injured. The one thing good neighbors do not do, even under severe provocation, is go to court (pp. 60-64).

Legal rules proved to be irrelevant to more than just the treatment of straying cattle. California has quite detailed laws specifying when one of two adjoining landowners can build a fence and charge his neighbor for part of it. Landowners in Shasta County build fences,

4. Robert C. Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 STAN. L. REV. 623 (1986). Other articles are Robert C. Ellickson, *A Critique of Economic and Sociological Theories of Social Control*, 16 J. LEGAL STUD. 67 (1987), and Robert C. Ellickson, *A Hypothesis of Wealth-Maximizing Norms: Evidence from the Whaling Industry*, 5 J.L. ECON. & ORG. 83 (1989).

5. To exaggerate only a little, the law-and-economics scholars believe that the law-and-society group is deficient in both sophistication and rigor, and the law-and-society scholars believe that the law-and-economics theorists are not only out of touch with reality but also short on humanity.

This book was written with one foot firmly placed in each of these two opposing camps. Pp. 7-8.

and their neighbors sometimes end up paying for them. But the relevant law has no effect upon what fences get built and who pays for them (pp. 69-71).

Legal rules do seem to have some effect on ranchers' willingness to let their cattle stray onto highways, where they might be hit by passing motorists. Ranchers are much more careful to avoid such accidents in closed range than in open range — that, according to Ellickson, is the main reason that people care enough about the legal categories to lobby the board of supervisors for and against proposals to close areas of previously open range (pp. 82-83, 104-05). Ranchers are more careful because they believe that in open range the driver is strictly liable for damages to cattle (the motorist "buys the cow") while in closed range the rancher is strictly liable (the rancher "buys the car") (pp. 82, 104-05).

Oddly, by Ellickson's account, the ranchers are wrong: whether an accident occurs in closed or open range has little or no effect on who is liable for what after a collision (pp. 87-93). The one form of behavior affected by the legal distinction between closed and open range is one to which it is almost irrelevant.

Ellickson's account of how conflicts involving traffic accidents with animals are settled raises a number of different issues. The first, and simplest, is why the same people who are almost never willing to go to court on one set of issues are frequently willing to do so on another. The answer is fairly clear. Both trespass and the construction and maintenance of fences involve frequent minor conflicts between neighbors — people locked into a long-term relationship with each other. Highway accidents are rare, sometimes large, conflicts between people who usually do not know each other and have no reason to expect to be in contact in the future. On almost any plausible theory of norms, it is easier to use them to deal with the former than the latter sort of problem. And indeed it appears, from Ellickson's account, that minor highway accidents involving neighbors — the kind of accidents for which norms are adequate — do get handled by norms rather than law (p. 95).

The second and harder problem is to explain why ranchers are ignorant of the relevant law — why they believe that they "have the rights" in open range, when in fact highway accidents in both open and closed range are covered by essentially the same rules of negligence. The corresponding ignorance with regard to trespass and fence law is easy enough to explain. Since these conflicts are resolved by norms rather than by laws, knowledge of the law is of no value to the people concerned, and there is no good reason for them to pay the cost of acquiring it. They are exhibiting what economists call "rational ignorance."

But accident claims are frequently resolved by law rather than by

norms. Furthermore, according to Ellickson, the ranchers' false beliefs about the law actually influence their behavior in at least two important ways. Farmers who have been grazing their cattle during the summer in unfenced areas of open range (typically upland forests leased from timber companies, the U.S. Forest Service, or the Bureau of Land Management)⁶ move elsewhere when the range is closed, not because they are worried about being sued for trespass but because they are afraid that one of their cattle will wander onto a road and be involved in an accident, leaving them liable for the damages (pp. 110-12). And ranchers, whether or not they let their cattle roam free, campaign fiercely against proposals to close additional areas of range.

Assuming that Ellickson has correctly described the law, the ranchers' beliefs, and the ranchers' behavior, his observations seem inconsistent with the economist's usual assumption of rationality. Information about law is not free, but it is not all that expensive. According to Ellickson, the ranchers are aware that the courts in several cases have found the owners of cattle liable for accidents that happened in open range — striking evidence that the ranchers' view of the law is wrong. Instead of changing their views, however, they interpret the cases as experimental error — the judge got the law wrong.⁷ That does not look like a rational approach to processing information when something valuable is at stake.

Ellickson's explanation of the paradox is that political clashes over proposals to close parts of the range are symbolic rather than actual battles. The ranchers are really fighting over status, not liability law. By winning, they establish that Shasta County is still Marlboro Country — a place where the ranchers are in the saddle, politically and socially as well as literally. Because they are not willing to admit, even to themselves, what they are fighting over, they instead maintain their false beliefs about the law in order to provide a plausible excuse for their own actions (pp. 114-19).

As an explanation of political behavior, this may make a good deal of sense. If the only decision affected by ranchers' beliefs about the law were whether to oppose petitions to close the range, then the symbolic stakes involved, although not the sort of values usually included in economic analysis, might provide a rational justification for the ranchers' actions. Their beliefs would then be a costless way of concealing from themselves and others the nature of what they were doing.

But Ellickson's psychological explanation is much less convincing

6. These are what Ellickson describes as "traditionalist" ranchers, as distinguished from the "modernists" who typically use irrigated, fenced pasture to get their cattle through the summer. Pp. 22-25.

7. "These settlements affronted the cattlemen's belief that a motorist always bears losses arising out of open-range collisions. The cattlemen were certain that the insurance companies and courts, because of either incompetence or gutlessness, had misconstrued the law." P. 99.

in the case of ranchers who change where they herd their cattle in response to false beliefs about legal liability.⁸ If acting on more accurate beliefs about the law would make them better off, it is hard to believe that there is no excuse they could find for politically opposing closed-range ordinances while continuing to herd in closed range.⁹

The answer, I think, is that acting on more accurate beliefs about the law would not make the ranchers better off. Although their beliefs are incorrect, their actions are probably correct. The explanation for this paradox is that the cost to a traditionalist rancher — one who lets his cattle run free during the summer — of not leasing land in closed range areas is essentially zero, since land is available to lease at the same price in open range areas. Although the difference in expected liability costs between open and closed range is not nearly as great as the ranchers believe, it is quite likely, for reasons Ellickson discusses, that there is some difference — that under some circumstances an animal's owner might be found liable for an accident in closed range when he would not in open range.¹⁰ If so, then it makes sense for traditionalist ranchers to avoid closed-range areas if they can do so at little or no cost.

This explanation suggests two new puzzles. Why is the price for leasing land the same in both areas when the consequence is that the owners of unfenced grazing land in closed range have no tenants and no rents? Why do the owners not cut the price they charge enough to compensate the ranchers for the small increased cost of liability? And, given that this is happening, why do we not find that the owners of such land, rather than the ranchers who rent it, are the ones leading the opposition to petitions to convert areas from open to closed range? It is the landowners, after all, who are actually bearing the cost of the conversion.

8. The false belief about the liability consequences of open versus closed range might also impose costs on modernist ranchers, who use fenced range, since it could induce them to take additional precautions to make sure their cattle never got out. According to Ellickson, such effects are meager at best. Pp. 112-13.

9. They could, for example, claim that they were continuing to herd cattle in the closed-range areas despite the risk of liability claims or higher insurance, thus representing themselves to themselves as bravely bearing the cost of maintaining the ranchers' way of life against adverse conditions.

10. As Ellickson explains:

Although formal legal analysis thus suggests that a closed-range ordinance should have no evidentiary weight in a collision case, the fact of a closure might in practice increase a motorist's chances of prevailing for a number of reasons. First, if a collision case were to be litigated, a trial judge might allow a motorist to introduce the fact that the collision had occurred in closed range as evidence that the cattlemen had been negligent Second, a Shasta county ordinance makes it unlawful for a livestock owner, other than an owner of "livestock upon the open range," to permit his animals "to habitually trespass" on public property (such as a highway). . . . a closure may in fact somewhat increase motorists' prospects in collision cases, although certainly not by as much as the cattlemen's folklore would have it.

Pp. 92-93.

The answer to both questions is very simple. Most of the land used for unfenced grazing is owned by either the Bureau of Land Management or the U.S. Forest Service. Neither organization is willing to delegate to its local agents the authority to set prices — with the result that both of them charge a uniform price for grazing leases across the entire western United States. The remaining land is owned by large timber companies, whose policies are only slightly more flexible (pp. 105-06). The amounts at stake in grazing leases on upland forests are not large enough to make it worth the cost, to either the public or the private owners, of overcoming the principal-agent problems that prevent them from either fine-tuning their leases or intervening in local politics to prevent areas they own from being closed.

If the explanation I have offered is correct, then Ellickson's account of how ranchers behave is consistent with conventional economic ideas of rationality. Rationality, after all, is an assumption about what people do, not why they say they do it. Ellickson's explanation of why ranchers persist with their false beliefs does suggest interesting possibilities about why holding false beliefs may be rational — not because the beliefs are true, but because they are useful.

Ellickson does not limit his discussion to Shasta County. He also discusses, in somewhat less detail, norms that apply to orchard men in the Pacific Northwest (p. 189), whalers in the nineteenth century (pp. 191-204), and modern American academics (pp. 258-64). The last example is the cruelest, at least so far as his academic readers are concerned, since he offers evidence that professors, in photocopying each other's articles, ignore the relevant copyright laws while adhering to professional norms well-designed to serve the interests of our academic community — in some cases at the expense of our publishers.

One of the charms of the descriptive first half of Ellickson's book is the way in which it uses simple observations of the real world to throw cold water into the faces of legal theorists of almost all sorts. It is hard to see how legal rules can serve the roles assigned to them by doctrinal scholars, economists, feminists, or practically anyone else, if nobody pays any attention to them.

Part of what Ellickson accomplishes in this book is an attack on legal centralism, the doctrine that assigns law a central role in determining what people do and what society is like. His purpose, however, is constructive. It is to explain the nature of the institutions that actually do a large part of what law is supposed to do. His central thesis is simple: close-knit groups tend to develop efficient norms. He concludes that while formal law is important and useful in human affairs, it is less important and less useful than generally believed. In a wide variety of situations, people not only succeed in resolving their conflicts without recourse to law, they do it by mechanisms that work considerably better than the legal system.

One important issue Ellickson does not explore is where such norms come from and why they tend to be efficient. If rules are well-designed, the obvious explanation is that someone designed them. While there may be some systems of religious norms that are actually the result of deliberate design, that does not seem a very plausible explanation for the norms that apply to straying cattle and fence building in Shasta County, or to those that determined who owned a whale when two different ships had been involved in killing it.

The obvious alternative to deliberate planning is evolution. Perhaps, over time, societies with better norms conquer, absorb, or are imitated by societies with worse norms, producing a world of well-designed societies. The problem with this explanation is that such a process should take centuries, if not millennia — which does not fit the facts as Ellickson reports them. Whaling norms, for example, seem to have adjusted rapidly to changes in the species being hunted.

Perhaps what is happening is evolution, but evolution involving much smaller and more fluid groups than entire societies. Consider a norm, such as honesty, that can profitably be followed by small groups within a society, applicable only within the group. Groups with efficient norms will prosper and grow by recruitment. Others will imitate them. Groups with similar norms will tend to fuse, in order to obtain the same benefits on a larger scale. If one system of norms works better than its competitors, it will eventually spread through the entire society. When circumstances change and new problems arise the process can repeat itself on a smaller scale, generating modified norms to deal with the new problems.

This conjecture about how norms arise and change suggests a prediction: even if a norm is efficient, it will not arise if its benefits depend on everyone's following it. Consider the whaling norms that Ellickson discusses. Any pair of captains has an interest in agreeing in advance to an efficient rule for dealing with whales that one ship harpoons and another one brings in, just as a pair of individuals has an interest in agreeing to be honest with each other. But a rule for holding down the total number of whales killed so as to preserve the population of whales is useful only if everyone follows it. The former type of norm existed, the latter did not — with the result that nineteenth-century whalers did an efficient job of hunting one species after another to near extinction.¹¹

11. A slightly different way of putting this argument is to say that we are observing what Dawkins has described as the evolution of "memes": ideas evolving in an environment consisting of the minds of humans. See RICHARD DAWKINS, *THE SELFISH GENE* 203-15 (1976). One reason a meme — such as the belief that "one ought to be honest towards honest people" — will spread is that those holding it are observed to be more successful as a result. But in order for the process to get past the early stage, when the meme is still rare in the population, it must be useful to hold the meme even when most other people do not. This works for memes representing norms such as honesty, but it does not work for a meme for conservation of whales, which raises the very interesting questions of why memes in favor of conservation have recently spread so

This conjecture explains one feature of the norms that Ellickson observes — their apparent failure to deal with certain sorts of problems. Ellickson discusses at least two other superficially puzzling features. One is the tendency to use inefficient punishments to enforce norms (pp. 217-19). A second is the apparent preference for non-monetary over monetary payments (pp. 234-35).

For an example of an inefficient punishment, consider the case of straying cattle. Suppose that, for the tenth time, a herd of your cattle breaks down my fence and destroys my garden. I know from the previous nine incidents that calling you up to complain will do no good — you will retrieve the cattle but do nothing to reimburse me for my damages. Calling up a lawyer and suing you would violate the strong norm against taking neighbors to court. What do I do?

The obvious efficient solution, at least in a rural context, is to convert one of the ten animals into packages of meat in my deep freeze, then call you up to complain that nine of your cattle have gotten into my garden. I thus punish you and reimburse myself simultaneously. After a few repetitions you are likely to get the point — and if not, at least I will eat well.

This solution is obvious and seems efficient, but it is not what happens. Instead of slaughtering one animal, I drive the whole herd to some inconvenient location many miles from both my farm and your ranch. Instead of imposing costs on you in a way that benefits me, thus holding down the net cost of the punishment, I use a punishment that is costly for both of us. Why?

Ellickson recognizes the problem and suggests, though he does not fully explicate, the answer. In his words, "[t]he major disadvantage of a seizure, as opposed to a destruction, is that someone who loses property to an intentional taker is more likely to interpret the event as an act of initial aggression than as an exercise in self-help" (p. 216).

The issue is not merely one of misinterpretation. As Locke pointed out many years ago, every man is a biased judge in his own case.¹² If the victim, sitting as his own judge and jury, knows that the higher the punishment he imposes the larger his own benefit, he will have a strong incentive to find the defendant guilty.¹³ If the punishment is costly for both parties, the victim will only be willing to impose it

rapidly within our current population — to the point where belief in conservation has become very nearly the secular equivalent of a state religion.

12. See JOHN LOCKE, *TWO TREATISES ON CIVIL GOVERNMENT* 191-92 (2d. ed., George Routledge & Sons 1887) (1690).

13. In the context of law rather than norms, this is one argument against using efficient punishments such as forcing convicted criminals to "work off" their debt to society — it gives the court system an incentive to lower its standard of proof when the local government decides that it needs convict labor to build a road. A good fictional statement of the argument, in the context of the proposal that those guilty of capital crimes should forfeit their organs (for transplants) as well as their lives, is in Larry Niven, *The Jigsaw Man*, in *ALL THE MYRIAD WAYS* 45 (1971).

when he really believes that the trespasser has been behaving unreasonably and must be stopped. The victim, knowing that, will be much more willing to accept the judgment and reform his behavior. Thus a norm limiting the injured party to inefficient punishments is actually an efficient rule. It raises the cost of punishment, but it makes it much more likely that a punishment will have its desired effect and less likely that it will set off an escalating feud.¹⁴

The second puzzle is why the equivalent of damage payments in a system of norms takes a nonmonetary form — reimbursing a neighbor by helping him replant his garden instead of simply paying for the damage done. Ellickson's explanation is that cash transactions are "cold and impersonal A constitutive norm favoring in-kind transfers . . . puts members through the ritual of signalling that they are in solidarity, rather than at arm's length" (p. 235). But this fails to explain why money transactions are seen as cold, and whether this perception, and this characteristic of Shasta County norms, apply more generally. In plenty of societies, after all, money is explicitly involved in marriage arrangements, even though an important element of such arrangements is the creation of solidarity between the newly related kindreds. In one of the most famous feuds in literature, the killing match in *Njal's Saga*,¹⁵ Njal and Gunnar maintain the peace by passing a purse of silver back and forth to compensate each other for the killings alternately instigated by their feuding wives.

Robert Ellickson does not, and cannot be expected to, fully answer all of the questions that he raises. Understanding the nature of nonlegal norms is a hard problem, and any adequate theory of such norms will almost certainly draw on a variety of different sorts of expertise, probably including economics, game theory, and anthropology as well as law. What he does do is make it overwhelmingly clear that nonlegal norms are a complex and important topic and make a reasonable start at sketching out an approach to understanding them.

14. An even better norm would be one that required punishments that were costly to both parties but benefited other members of the society — slaughtering the animal and donating it to the local soup kitchen, for example. This might not work for small groups, since potential beneficiaries might conspire with the "victim" to induce him to impose the punishment even when it was not deserved — and, for reasons discussed above, a norm that does not work for small groups is unlikely to develop.

15. *NJAL'S SAGA* 81-87 (Carl F. Bayer Schmidt & Lee Hollander trans., 1955).

DIVORCE REFORM AND THE LEGACY OF GENDER

Milton C. Regan, Jr. *

THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM. By Martha Albertson Fineman. Chicago: University of Chicago Press. 1991. Pp. 252. \$27.50.

I. GENDER AND DIVORCE

A growing body of evidence indicates that the economic consequences of divorce are far worse for women than for men.¹ While data for periods earlier than the past two decades are sparse, there is every reason to believe that this disparity is not a recent phenomenon. Alimony historically has been awarded to women in a relatively small percentage of cases.² Furthermore, until recently, the vast majority of

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1. See, e.g., BARBARA BAKER, FAMILY EQUITY AT ISSUE (1987); LISA J. BRETT ET AL., WOMEN AND CHILDREN BEWARE (1990); GLORIA J. STERIN ET AL., DIVORCE AWARDS AND OUTCOMES (1981); LENORE J. WEITZMAN, THE DIVORCE REVOLUTION (1985); Saul Hoffman & John Holmes, *Husbands, Wives and Divorce*, in 4 FIVE THOUSAND AMERICAN FAMILIES — PATTERNS OF ECONOMIC PROGRESS 23 (Greg J. Duncan & James N. Morgan eds., 1976); Rosalyn B. Bell, *Alimony and the Financially Dependent Spouse in Montgomery County, Maryland*, 22 FAM. L.Q. 225 (1988); Greg J. Duncan & Saul D. Hoffman, *A Reconsideration of the Economic Consequences of Marital Dissolution*, 22 DEMOGRAPHY 485 (1985); Thomas J. Espenshade, *The Economic Consequences of Divorce*, 41 J. MARRIAGE & FAM. 615 (1979); Marsha Garrison, *Good Intentions Gone Awry: How New York's Equitable Distribution Law Affected Divorce Outcomes*, 57 BROOKLYN L. REV. 619 (1991); James B. McLendon, *Separate But Unequal: The Economic Disaster of Divorce for Women and Children*, 21 FAM. L.Q. 351 (1987); Karen Seal, *A Decade of No-Fault Divorce: What It Has Meant Financially for Women in California*, 1 FAM. ADV. 10 (1979); Charles E. Welch, III & Sharon Price-Bonham, *A Decade of No-Fault Divorce Revisited: California, Georgia, and Washington*, 45 J. MARRIAGE & FAM. 411 (1983); Heather R. Wishik, *Economics of Divorce: An Exploratory Study*, 20 FAM. L.Q. 79 (1986).

Lenore Weitzman's study probably has received the most attention; for critiques of it, see Jed H. Abraham, *"The Divorce Revolution" Revisited: A Counter-Revolutionary Critique*, 9 N. ILL. L. REV. 251 (1989); Saul D. Hoffman & Greg J. Duncan, *What Are the Economic Consequences of Divorce?*, 25 DEMOGRAPHY 641 (1988); Herbert Jacob, *Another Look at No-Fault Divorce and the Post-Divorce Finances of Women*, 23 LAW & SOC. REV. 95 (1989); *Review Symposium on Weitzman's Divorce Revolution*, 1986 AM. B. FOUND. RES. J. 757. As Joan Krauskopf observes, "[e]ven those who criticize Weitzman's figures differ on amount, not on significant disparity in standard of living between ex-husbands and ex-wives." Joan M. Krauskopf, *Theories of Property Division/Spousal Support: Searching for Solutions to the Mystery*, 23 FAM. L.Q. 253, 271 n.65 (1988).

2. See WALTER GELLHORN ET AL., CHILDREN AND FAMILIES IN THE COURTS OF NEW YORK CITY 340-43 (1953); Lenore J. Weitzman & Ruth B. Dixon, *The Alimony Myth: Does No-Fault Divorce Make a Difference?*, 14 FAM. L.Q. 141, 143 (1980).

states were common law property states that divided property at divorce according to title, a practice that significantly favored men and their greater access to market resources.³

More controversial is the question whether the recent series of changes associated with no-fault divorce has worsened this situation. These changes commonly, although not uniformly: provided for unilateral divorce without proof of fault; expanded the definition of property available for distribution between spouses and directed that it be divided "equitably"; created a presumption that alimony is available only in extraordinary circumstances and then is limited to a period sufficient to "rehabilitate" the recipient's market prospects; and eliminated custody presumptions favoring mothers.⁴ A less widespread, but still significant, trend has been the elimination in many states of marital fault as a consideration in determinations regarding property,⁵ alimony,⁶ and custody.⁷

Some scholars argue that a system in which divorce was available only for proof of fault provided women bargaining leverage, affording them the opportunity to extract economic concessions in return for agreement to cooperate in obtaining a divorce.⁸ Others challenge this thesis, maintaining that changes in property and alimony rules, rather than in the grounds for divorce, have made women's financial position more precarious.⁹ Still others acknowledge that women are worse off than they were before divorce reform, but question whether we can

3. Mary Ann Glendon, *Family Law Reform in the 1980s*, 44 LA. L. REV. 1553, 1555-57 (1984); Jacob, *supra* note 1, at 96.

4. See generally MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW* (1989); HERBERT JACOB, *SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES* (1988).

5. See Doris J. Freed & Timothy B. Walker, *Family Law in the Fifty States: An Overview*, 21 FAM. L.Q. 417, 467 (1988) [hereinafter Freed & Walker, *Family Law Overview 1988*] (stating that the trend with respect to property division "has been to minimize the importance of marital misconduct as a factor in litigation"). Seventeen states explicitly prohibit consideration of fault in property distribution decisions, and the Virgin Islands permits it only in awards of the marital home. Doris J. Freed & Timothy B. Walker, *Family Law in the Fifty States: An Overview*, 24 FAM. L.Q. 309, 343-44 (1991) [hereinafter Freed & Walker, *Family Law Overview 1991*]; see also UNIF. MARRIAGE & DIVORCE ACT § 307, 9 U.L.A. 238 (1988) [hereinafter UMDA] (requiring courts to divide marital property at time of divorce "without regard to marital misconduct").

6. See Freed & Walker, *Family Law Overview 1988*, *supra* note 5, at 472 ("[Alimony] awards are increasingly no-fault oriented."). Twenty-eight states and the Virgin Islands explicitly exclude fault as a consideration in alimony determinations. Freed & Walker, *Family Law Overview 1991*, *supra* note 5, at 355-56. The Uniform Marriage and Divorce Act does as well. See UMDA § 308(b), 9A U.L.A. 348 (1988).

7. See, e.g., *Etheridge v. Etheridge*, 375 So. 2d 474 (Ala. 1979); *Rizzo v. Rizzo*, 420 N.E.2d 555 (Ill. App. 1981); *Commonwealth ex rel. Myers v. Myers*, 360 A.2d 587 (Pa. 1976); see also UMDA, § 402, 9A U.L.A. 561 (1988) ("The court shall not consider conduct of a proposed custodian that does not affect his relationship to the child.").

8. WEITZMAN, *supra* note 1, at 26-28.

9. See, e.g., Marsha Garrison, *The Economics of Divorce: Changing Rules, Changing Results*, in *DIVORCE REFORM AT THE CROSSROADS* 75 (Stephen D. Sugarman & Herma Hill Kay eds., 1990) [hereinafter *DIVORCE REFORM*].

isolate changes in legal rules, rather than other social conditions, as the source of this decline.¹⁰ Finally, some observers argue that women in fact are not worse off at divorce now than in earlier periods, and that a focus on fault versus no-fault divorce diverts us from addressing more fundamental reasons for the often devastating financial effect of divorce on women.¹¹

Martha Fineman¹² is one who argues that divorce reform has indeed left women more vulnerable after divorce. Specifically, she argues that changes in property distribution rules have left women worse off financially because they replaced rules that often gave women more than half of the couple's assets at divorce. Furthermore, she claims that the movement away from custody rules favoring the mother toward rules favoring joint custody has increased the prospect that mothers will lose custody of their children and has granted fathers more bargaining leverage in divorce negotiations.

Fineman finds an ironic culprit responsible for these changes: "liberal legal feminists" (p. 10), who pressed for divorce reforms in the belief that they would improve the lot of women. The problem, Fineman maintains, is that the vision of these feminists was flawed from the outset. Their overriding concern was the achievement of access to the "public" sphere of market work and politics from which women historically had been excluded. Their battle cry in this endeavor, borrowed from social movements such as the civil rights campaign, was "equality." Women and men are equally capable of performing the work that men traditionally have dominated, they proclaimed, and therefore should be treated equally. This strategy resulted in several Supreme Court decisions in the 1970s striking down statutes that violated this principle of equal treatment of men and women.¹³

Fineman argues that these feminists saw women's traditional emphasis on domestic responsibilities as an obstacle to market access, at odds with the rhetoric of equality of opportunity. As a result, they sought to formulate a conception of marriage as a partnership of equals in which men and women make different but comparable contributions. This image enabled feminists to avoid confronting the actual dependence of women within marriage. Acknowledging and responding to this dependence was seen as perilous, suggests Fineman,

10. See, e.g., Herbert Jacob, *Faulting No-Fault*, 1986 AM. B. FOUND. RES. J. 773.

11. See, e.g., Stephen D. Sugarman, *Dividing Financial Interests on Divorce*, in *DIVORCE REFORM*, *supra* note 9, at 130, 135.

12. Professor of Law, Columbia University.

13. See, e.g., *Orr v. Orr*, 440 U.S. 268 (1979) (holding that men as well as women must be eligible for alimony); *Califano v. Goldfarb*, 430 U.S. 199 (1977) (holding that women must receive social security benefits on same basis as men); *Stanton v. Stanton*, 421 U.S. 7 (1975) (holding that female children of divorced parents are entitled to support for same period of time as male children).

because it might "stigmatize or call into question the abilities or commitment of the 'protected' sex on a wider work-related scale" (p. 26; footnotes omitted). The assertion of the fundamental equality of men and women within the family thus was seen as an important symbolic gesture, offering a powerful aspiration that family law was to reinforce.

This rhetoric of equality and partnership led naturally to rules that dictated the equal division of marital assets at divorce, even though women typically are far more financially needy than men at that point. Furthermore, "[w]omen were no longer to be formally designated and identified as caretakers of children, a role that would impede equal market involvement" (p. 29). Equality instead demanded an emphasis on both parents' child-rearing responsibilities, which led naturally to a preference for joint custody. Liberal feminists thus were interested in family law reform "only because the family was viewed as affecting access to political and economic power" (p. 24). As a result, rather than face "the difficult problem of what equality should mean in the family context," they reflexively "for the most part only transposed feminist market ideology onto the family law area" (p. 25; footnote omitted). Ignoring a backdrop of gender disparity, they were confident that law's expression of the ideal of equality had the symbolic power to realign attitudes in accordance with this ideal. Consequently, large numbers of women have suffered economic hardship for the sake of illusory symbolic benefits.

Professor Fineman's book offers much in the way of trenchant critique and provocative insight. Her analysis of the effect of an equality standard in property distribution is persuasive and is supported by recent work that indicates that the image of equality exerts a powerful pull in property decisions, even when it leaves women in need.¹⁴ Fineman also provides a useful analysis of at least part of the politics underlying a shift in emphasis to joint custody (pp. 79-94). Her account of the role of fathers' rights organizations seems consistent with the historical evidence, and her examination of the role of the "helping professions," such as psychology and social work, in influencing our understanding of divorce demonstrates a keen sensitivity to the power of language to shape our perception of reality.¹⁵ Her account of the debates over no-fault divorce in Wisconsin (pp. 53-75) is a fascinating case study of the ways in which social problems are constructed and reforms are formulated. Finally, I am deeply sympathetic to Fineman's suggestion that recent trends in family law too often exalt self-interested behavior over more cooperative and altruistic conduct.

At the same time, Fineman's emphasis on the unsuitability of equality rhetoric, and her insistence on the culpability of liberal femi-

14. See *infra* notes 46-59 and accompanying text.

15. See *infra* notes 116-17 and accompanying text.

nists, tends to oversimplify our dilemma, neglecting the complex interaction between divorce and gender. Her argument that feminists were a powerful influence on the shape of divorce reform, for instance, is belied by evidence that in most states feminists had little involvement in the passage of divorce legislation.¹⁶ In addition, to the extent that feminists participated in debates about property distribution, their focus on equality was not merely symbolic, but was motivated by quite practical concerns. Furthermore, given the typical paucity of assets available for distribution at divorce, property rules are unlikely to be the primary source of any worsening of women's financial condition at divorce. Of greater significance has been a lesser willingness to award alimony, and our inability or unwillingness in the wake of no-fault divorce to reformulate a theory to justify entitlement to some share of an ex-spouse's income.

More generally, Fineman's position that law only reflects, and is generally powerless to provoke, social change embodies a dichotomy that recent legal and cultural theory has called into question. Her formulation leads her to overlook the ironic possibility that her own proposals, particularly regarding custody, may serve to perpetuate the very system of gender disadvantage that she decries. Finally, her acceptance of a second rigid dichotomy — between equality and equity — neglects recent feminist reconceptions of equality that do not rest on formal equality of identical individuals, but on acknowledgment of differences between men and women.¹⁷

Central to understanding both the force of Fineman's analysis and its limitations is an appreciation of the ways in which the gender system tends to disadvantage women economically. Thus, before moving to a more detailed examination of her argument, I will explore the connection between gender and economic vulnerability.

II. GENDER AND MONEY

Women and men face substantially different economic prospects over the course of their lives. The average full-time female worker earns only seventy-one percent of the wage earned by her male counterpart,¹⁸ and the average college-educated woman earns less than a typical man with only a high-school diploma.¹⁹ Among white married couples from ages twenty-five to sixty-four, three of four husbands earn more than their wives; in half these marriages the wife's wage is

16. See *infra* notes 60-67 and accompanying text.

17. See *infra* notes 175-216 and accompanying text.

18. BUREAU OF LABOR STATISTICS, U.S. DEPT. OF LABOR, *EMPL. & EARNINGS* 71 (July 1987).

19. CYNTHIA M. TAEUBER & VICTOR VALDISERA, BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, *CURRENT POPULATION REPORTS, SPECIAL STUDIES, SERIES P-23, No. 146, WOMEN IN THE AMERICAN ECONOMY* 31 (1986).

less than two thirds that of her husband.²⁰ When both spouses are the same age and have the same education, the odds against a wife earning more than her husband are three to one.

These disparities reflect the fact that women are concentrated in jobs that offer lower pay, fewer benefits, and fewer opportunities for advancement than jobs in which men tend to be employed. More than two thirds of women work in occupations in which seventy percent or more of the workers are female.²¹ Despite centuries of racial discrimination and disadvantage, employment is significantly more segregated by sex than by race.²² Furthermore, data on segregation by occupation understate differences, because "even workers employed in apparently sex-neutral occupations often work in industries, firms, departments, and jobs that are highly segregated by sex."²³ This segregation results in substantial wage differences *within* occupations. Only one percent of white men and women are employed in jobs in which women earn as much as ninety percent of men; almost three fourths are in occupations in which women earn less than seventy percent of what men earn.²⁴

A recent study of the relative economic condition of men and women over the period 1960-1986 concluded that "the gap between women and men in economic well-being was no smaller in 1986 than in 1960."²⁵ The only group for whom matters improved during these years were young, white, unmarried, well-educated women, most of whom were childless.²⁶ Despite significant changes in social attitudes in the past three decades, and notwithstanding the elimination of much formal sex discrimination in the law, women remain far more economically vulnerable than men in American society.

20. VICTOR R. FUCHS, *WOMEN'S QUEST FOR ECONOMIC EQUALITY* 52 (1988).

21. Jerry A. Jacobs, *Long-Term Trends in Occupational Segregation by Sex*, 95 AM. J. SOC. 160, 160 (1989).

22. The Duncan index indicates the percentage of women who would have to change jobs in order to eliminate sex differences in the distribution of men and women in different occupations, and the percentage of blacks who would have to change jobs in order to achieve comparable racial distributions among occupational categories. In 1980, the index was 57% for women. By contrast, the figure was 28% for black women versus white women, and 33% for white men versus black men. FUCHS, *supra* note 20, at 33-34.

23. Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749, 1751 n.1 (1990); see also SUZANNE M. BIANCHI & DAPHNE SPAIN, *AMERICAN WOMEN IN TRANSITION* 165 (1986) ("The workplace is substantially more segregated by sex than has been shown by studies of occupational concentration. . . . [A] great degree of sex differentiation exists among the specific job titles included in the occupation.").

24. FUCHS, *supra* note 20, at 51. By contrast, one third of black men are employed in jobs in which black men earn at least 90% of what white men earn, and two thirds are in occupations in which their earnings are 80% or more of those of white men. *Id.*

25. *Id.* at 3. Economic well-being is defined as "money income plus the imputed value of goods and services produced within the household plus leisure as measured by time available after paid and unpaid work." *Id.*

26. *Id.*

Marriage is both a source of these disparities and a buffer against their full force. On the one hand, marriage perpetrates disadvantage because most married couples have children, and women still overwhelmingly assume primary responsibility for the care of those children. Victor Fuchs' study of economic inequalities between men and women concludes that "women's weaker economic position results primarily from conflicts between career and family, conflicts that are stronger for women than for men."²⁷ This state of affairs seems to be the product of a complex interaction between socialization and employment opportunity.

The messages of socialization may be more equivocal for women than a generation ago,²⁸ but "[t]he social and psychological importance placed on childbearing remains enormous."²⁹ Kathleen Gerson's study of how women make decisions about family and career, for instance, found that women who opted for childlessness had to confront both social disapproval and personal doubt. They were able to make their choice only by consciously developing strategies that provided insulation from opprobrium and personal anxiety.³⁰ Many women believe, even if subconsciously, that a mother who is seriously committed to her career is shortchanging her child.³¹ Mothers who attempt to combine career and motherhood often find it necessary explicitly to make "a difficult break from past assumptions and parental messages" that mothers should be home with their children.³² The continuing strength of the expectation that women will structure their lives around primary responsibility for children is reflected in recent surveys of undergraduates and law students. One study of college students over the past several years revealed that more than sixty percent of the women but fewer than ten percent of the men said that they would substantially reduce work hours or quit work altogether if they had young children.³³ Similarly, a survey of law students indicated that fifty percent of the women but virtually none of the men said that they expected to have half or more of the child care responsibility if

27. *Id.* at 4.

28. See JAMES A. SWEET & LARRY L. BUMPASS, *AMERICAN FAMILIES AND HOUSEHOLDS* 397 (1989).

29. KATHLEEN GERSON, *HARD CHOICES: HOW WOMEN DECIDE ABOUT WORK, CAREER, AND MOTHERHOOD* 153 (1985).

30. *Id.*

31. Professor Gerson points out, for instance, that both full-time mothers and childless women tend to accept this idea, differing only in the way in which they resolve the perceived conflict. *Id.* at 184-85, 187. As she observes:

Although their positions were used to justify different actions, childless and domestically oriented women agreed that career and motherhood are incompatible, that children suffer when their mothers are strongly committed to the workplace, and that work is an acceptable option for mothers only as long as it is not defined in terms of career.

Id. at 187.

32. *Id.* at 177.

33. FUCHS, *supra* note 20, at 47.

they had children.³⁴

Professor Gerson's work emphasizes the ways in which these expectations are shaped in the context of the employment opportunities available for men and women. She found that the decision to have a child, for instance, was strongly associated with frustration about prospects at work.³⁵ Women who are dissatisfied with their work situation are not necessarily prompted to look for a better job or to pursue more education, because motherhood offers a socially recognized "alternative occupation."³⁶ Furthermore, once they have a child, women confront a workplace that is structured around the model of "an ideal worker with no child care responsibilities,"³⁷ which means little flexibility in terms of hours, work location, or time off to attend to domestic needs. Wage differences between men and women provide additional economic reinforcement for a gendered division of labor, since the opportunity cost of a father's assuming primary caregiving responsibility is typically greater than the cost of a mother's doing so. Even if a woman surmounts all these obstacles to career commitment, she typically performs disproportionate amounts of housework and child care when home.³⁸ As a result, professional women are far more likely than their male counterparts to leave the work force and to "specialize in fields [with] the shortest and most predictable work schedules."³⁹

The connection between marriage and women's economic disadvantage is succinctly captured in two sets of figures. First, by the time they are in their forties, married women make only eighty-five percent as much as unmarried women; by contrast, married men make more than unmarried men at every age.⁴⁰ Second, recent surveys indicate that only thirty-five percent of women in management positions have children, compared with ninety-five percent of their male counterparts.⁴¹

At the same time, marriage provides some insulation from the eco-

34. Project, *Law Firms and Lawyers With Children: An Empirical Analysis of the Family/Work Conflict*, 34 STAN. L. REV. 1263, 1281 (1982).

35. See GERSON, *supra* note 29, at 103-10.

36. *Id.* at 108.

37. Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 822 (1989).

38. Arlie Hochschild has calculated that each year women work an entire month more than men do. ARLIE HOCHSCHILD WITH ANNE MACHUNG, *SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME* 3 (1989). Another study indicates that in 1983 working wives worked an average of 144% of what housewives worked, a figure that had increased from 113% in 1969. Julie A. Heath & David H. Ciscel, *Patriarchy, Family Structure and the Exploitation of Women's Labor*, 22 J. ECON. ISSUES 781, 787 (1988).

39. Deborah L. Rhode, *Perspectives on Professional Women*, 40 STAN. L. REV. 1163, 1181-82 (1988).

40. FUCHS, *supra* note 20, at 59-60.

41. Joan C. Williams, *Sameness Feminism and the Work/Family Conflict*, 35 N.Y.L. SCH. L. REV. 347, 352 (1990).

conomic disparities associated with gender. Spouses typically pool resources for use by all members of the household, without imposing strict eligibility requirements based on market contributions.⁴² Indeed, the family is often regarded as the paradigm of a social arrangement that allocates resources on the basis of need rather than entitlement. As a result, a wife need not rely solely on her earning power in order to obtain material necessities. As Deborah Rhode and Martha Minow put it: "[M]arriage has presented a promise — between the members of the couple and also between the couple and society — that the costs of traditional gender roles will not be borne by women alone but will be spread more broadly throughout society."⁴³

Divorce destroys this buffer against economic vulnerability. "[T]he matrimonial crisis is a kind of awakening from a dream. The 'we' dream is over, the 'yours or mine' reality begins."⁴⁴ Women and men must confront life within a market system in which individual "human capital"⁴⁵ is a crucial determinant of their standard of living. At this point, the latent fault line of gender, suppressed and concealed during marriage, often erupts with a vengeance.

Fineman argues that liberal feminists failed to take into account this background system of gender in pressing for divorce reforms based on the principle of equality. As a result, she argues, they were instrumental in promoting property and custody rules that have had the effect of worsening the position of women at divorce. The next two sections examine these claims in more detail.

III. GENDER AND PROPERTY DIVISION

Fineman first trains her sights on the application of the equality ideal to the decision about how property should be distributed at the

42. See Susan W. Prager, *Sharing Principles and the Future of Marital Property Law*, 25 UCLA L. REV. 1, 6 (1977) ("[M]arried people are unlikely to make decisions on an individually oriented basis; rather the needs of each person tend to be taken into account."); Deborah L. Rhode & Martha Minow, *Reforming the Questions, Questioning the Reforms: Feminist Perspectives on Divorce Law*, in *DIVORCE REFORM*, *supra* note 9, at 191, 193 ("In an ongoing marriage, the entire family shares in the salary advantages and job-related medical, insurance, and pension benefits that disproportionately accompany male jobs." (footnote omitted)).

43. Rhode & Minow, *supra* note 42, at 194 (footnote omitted). This is not to say that economic disparities do not matter within an ongoing marriage. As Susan Moller Okin has observed, "[I]t is still clearly the case that the possession by each spouse of resources valued by the outside world, especially income and work status, rather than resources valuable primarily within the family, has a significant effect on the distribution of power in the relationship." SUSAN M. OKIN, *JUSTICE, GENDER, AND THE FAMILY* 158 (1989); see also PHILIP BLUMSTEIN & PEPPER SCHWARTZ, *AMERICAN COUPLES* 53-56 (1983) (indicating that economic disparities are associated with differences in power in all intimate relationships except lesbian couples).

44. OTTO KAHN-FREUND, *MATRIMONIAL PROPERTY: WHERE DO WE GO FROM HERE* 15 (1971).

45. See E. Raedene Combs, *The Human Capital Concept as a Basis for Property Settlement at Divorce: Theory and Implementation*, 2 J. DIVORCE 329 (1979); Joan M. Krauskopf, *Recompense for Financing Spouse's Education: Legal Protection for the Marital Investor in Human Capital*, 28 KAN. L. REV. 379 (1980).

time of divorce. Prior to the past two decades, most states divided property on the basis of title or used presumptions that favored husbands. When that practice came under reconsideration, Fineman argues, there were two conceptual approaches available as alternatives: need, which examines the economic condition of a dependent spouse, and contribution, which considers the extent to which a spouse has assisted in the acquisition of property (p. 51). Each had been used to a limited degree to offset egregious inequalities that arose under a title-based rule.

Fineman suggests that because women tend to be more economically needy due to our gendered division of labor, feminists logically should have urged that need should be the governing principle of property distribution. The result would be a directive that property be divided "equitably," which would authorize unequal divisions favoring women. The concept of need, however, has a "negative symbolic connotation[]" that made it unattractive to liberal feminists (p. 42). These women preferred instead to promote an image of marriage as a partnership, a model that provided "symbolically compelling presentations of gender equality and independence" (p. 39). The notion of marriage as a partnership ostensibly promoted greater respect for women's domestic responsibilities than the law earlier exhibited, firmly asserting that the work women performed at home was just as valuable as the work men performed outside the home. Such a model emphasized the contributions made by the spouses, rather than their relative need. It therefore created a natural inclination to divide property equally because of the spouses' assumed equivalent assistance in acquiring it.

Fineman claims that the equality rule has come to exert a powerful hold over the legal imagination, a contention that finds some support in both formal law and informal practice. Two of the eight community property states explicitly require that property be divided equally,⁴⁶ and another has established a presumption in favor of equal division.⁴⁷ In addition, four common law states that mandate *equitable* division impose a statutory presumption that equal distribution is equitable,⁴⁸ and courts in several other common law states have established a preference for equal division.⁴⁹

46. See CAL. CIV. CODE § 4800 (West Supp. 1992); LA. REV. STAT. ANN. § 9:2801 (West 1991).

47. IDAHO CODE § 32-712 (1983).

48. ARK. CODE § 9-12-315 (1991); N.C. GEN. STAT. § 50-20 (1991); W. VA. CODE § 48-2-32 (1986); WIS. STAT. § 767.255 (1989).

49. See *Wanberg v. Wanberg*, 664 P.2d 568 (Alaska 1983); *Hatch v. Hatch*, 547 P.2d 1044 (Ariz. 1976); *Temple v. Temple*, 519 So. 2d 1054 (Fla. Dist. Ct. App. 1988); *In re Marriage of Freese*, 226 N.W.2d 800 (Iowa 1975); *Sullivan v. Sullivan*, 388 N.W.2d 516 (Neb. 1986); *Alpin v. McAlpin*, 532 A.2d 1377 (N.H. 1987); *Cherry v. Cherry*, 421 N.E.2d 1293 (Ohio 1981); *In re Marriage of Simmons*, 639 P.2d 1296 (Or. Ct. App. 1982); *Dietz v. Dietz*, 540 S.W.2d 418 (Tex. Ct. App. 1976).

Even when no presumption of equality has been adopted, and even when a statute explicitly includes need as a factor to be considered as part of an equitable distribution,⁵⁰ Fineman maintains that the symbolic and practical appeal of equal division is considerable. Symbolically, the widely influential partnership model of marriage naturally leads to the assumption that the fairest way to allocate assets is to divide them equally. As a practical matter, equality offers "easily grasped contribution factors" that are more accessible to courts than less clear and less well-developed need factors (p. 49).

One recent survey of judicial property distribution decisions lends support to Fineman's argument.⁵¹ Suzanne Reynolds examined property allocation data for six equitable distribution states that are among those that "pa[y] the most statutory attention to need":⁵² Arkansas, Connecticut, Montana, New York, North Carolina, and Wisconsin. Of these, Arkansas, North Carolina, and Wisconsin follow a statutory presumption of equal division.

Reynolds found that in only a small percentage of cases did courts specifically focus on need in making their determinations.⁵³ Unless the economic disparity between the spouses was "the product of extraordinary circumstances," she observed, "courts appear reluctant to base an award of greater than half the property or an award of nonmarital property on need."⁵⁴ Even when an unequal division was based on need, the deviation from equality was slight, typically in the form of a sixty-forty split.⁵⁵ Furthermore, courts basing an unequal division on need typically offered "no explanation that links addressing need to any theory of equitable distribution."⁵⁶ By contrast, courts provided extensive discussions of the role of contribution in determining appropriate distributions of property at divorce.⁵⁷ Reynolds concluded that the idea of equal division is extremely influential in distribution decisions, even in states without a presumption of equality.⁵⁸

In sum, as Steven Sugarman put it, "most people are comfortable today with the notion that fairness, at least presumptively, suggests an even split of the divorcing couple's marital property," and "both the

50. As do twenty-eight equitable distribution statutes. See Suzanne Reynolds, *The Relationship of Property Division and Alimony: The Division of Property to Address Need*, 56 *FORDHAM L. REV.* 827, 841 (1988).

51. See *id.* at 844.

52. *Id.* at 844 n.81.

53. *Id.* at 852.

54. *Id.* at 854.

55. *Id.* at 855.

56. *Id.* at 857. Montana is an exception. *Id.* at 888.

57. *Id.* at 856.

58. She noted that her sample of appealed cases in fact probably overstated the percentage of cases involving unequal division. *Id.* at 867 n.170.

law and practice seem to be moving in that direction."⁵⁹ Fineman's argument that equality has come to dominate property division discourse therefore is persuasive, as is her point that background economic inequalities make equal division problematic for women. Her account of the emergence of this standard, as well as her assessment of its significance in producing economic disadvantage, is less persuasive, however.

First, Fineman's claim that liberal feminists were instrumental in pressing for an equal distribution standard overstates the involvement of feminists in the debate over divorce reform. As Herbert Jacob has indicated, a striking feature of most of the debate over changes in divorce law was the relatively small amount of political conflict over the reforms.⁶⁰ In most states, proposals were presented as narrow technical adjustments to family law, rather than as sweeping efforts to restructure social relationships. This understanding tended to confine participation to specialists in family law, with little involvement in most states by those interested in broader political issues. In retrospect, most conspicuous by their absence were women's groups. "It may have surprised many readers," Jacob said, "that feminists were not responsible for the transformation of American divorce law."⁶¹ The evidence indicates that "feminists stood on the sidelines during most of the activities that led to the adoption of these laws, and the interests of women in general were poorly represented during their consideration."⁶²

Fineman's characterization of feminists as influential in restructuring property distribution law apparently is based on her experience with divorce reform in Wisconsin. Her account of the way in which

59. Sugarman, *supra* note 11, at 148 (footnote omitted); see also STERIN ET AL., *supra* note 1, at 113 (noting "close approximation to equality" of property division in dissolution cases in Cuyahoga County, Ohio); Martha L. Fineman, *Implementing Equality: Ideology, Contradiction and Social Change*, 1983 WIS. L. REV. 789, 881 (noting that judges and attorneys estimated that 10% or fewer cases deviated from equal property division in Wisconsin).

60. JACOB, *supra* note 4, at 166-73.

61. *Id.* at 172.

62. *Id.*; see also DEBORAH L. RHODE, JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW 147 (1989) (stating that women's rights groups were not active in divorce reform, nor were women's interests well-represented); Herma Hill Kay, *An Appraisal of California's No-Fault Divorce Law*, 75 CAL. L. REV. 291, 293 (1987) ("[T]he achievement of legal equality between women and men was not a central goal of the divorce reform effort in California."); Isabel Marcus, *Locked In and Locked Out: Reflections on the History of Divorce Law Reform in New York State*, 37 BUFF. L. REV. 375, 435-36 (1988/1989) (noting that feminists were mostly concerned with issues other than divorce reform during period of greatest legal change); Rhode & Minow, *supra* note 42, at 195 (stating that the "women's rights movement was not significantly involved with early divorce reforms," primarily because "the implications of such reforms were not yet apparent").

For a claim that Professor Jacob overlooked the involvement of feminists in the formulation of the UMDA, see Grace G. Blumberg, *Reworking the Past, Imagining the Future: On Jacob's Silent Revolution*, 16 LAW & SOC. INQUIRY 115, 130-31 (1991). For Jacob's reply, see Herbert Jacob, *Reply to Blumberg*, 16 LAW & SOC. INQUIRY 155, 157 (1991).

divorce reform proceeded there is an interesting case study of legal change. It indicates that feminists in Wisconsin indeed saw changes in property law as an integral element in restructuring the law of divorce, and that they saw an equality standard as providing the most protection for women (pp. 53-75).

Wisconsin, however, was atypical. Jacob's history of no-fault legislation explicitly stated that Wisconsin was "unlike most states" in that "no-fault became linked to changes in property division at divorce through the active intervention of feminist advocates";⁶³ thus the debate was highly visible and fraught with political conflict.⁶⁴ By contrast, in most states advocates of changes in property law "managed to channel them in the routine policy-making process."⁶⁵ While women's groups were often more involved in debates over property law than in discussion of the grounds for divorce,⁶⁶ in most instances property reforms were presented as "narrow, technical proposals by experts in family law."⁶⁷

To some, then, feminists were guilty of sins of omission, by failing to give sufficient attention to divorce reform. Fineman's accusation of sins of commission, however, is wide of the mark. Divorce reforms in general, and changes in property distribution in particular, by and large simply were not the product of feminist efforts to impose a vision of equality.

Second, even when feminists did promote an equal division standard in property law, there were considerable practical, rather than merely symbolic, concerns that underlay their support. There was much concern at the time property reforms were being considered that the broad discretion typically afforded judges tended to lead to allocations that disfavored women.⁶⁸ In particular, many feared that the male-dominated courts would undervalue women's nonmarket domestic contributions to the household. Curbing judicial discretion through a statutory presumption of equal division was proposed as a way to "eliminate the gendered, differential evaluation of contributions to a marriage depending on whether work was inside or outside the home and hence eliminate the possible gender-based disparities in the distribution of assets."⁶⁹

These concerns continue to be relevant. One recent study of New

63. Jacob, *supra* note 1, at 100.

64. *Id.* at 100-01.

65. *Id.* at 105.

66. *Id.* at 122; see also Marcus, *supra* note 62, at 439-58 (describing split among feminists over whether equal or equitable distribution rule should be adopted). Women's rights groups in Pennsylvania successfully lobbied for an equitable distribution standard. See *Equal Versus Equitable*, 5 EQUITABLE DISTRIBUTION J. 73, 74 (1988).

67. JACOB, *supra* note 4, at 125.

68. See WEITZMAN, *supra* note 1, at 72; Marcus, *supra* note 62, at 452.

69. Marcus, *supra* note 62, at 452.

York, for instance, an equitable distribution state with no presumption of equality, suggested that women still tend to receive only about twenty-five to thirty percent of marital property at divorce,⁷⁰ and concluded that "there is little evidence in the reported cases that the bench is inclined to distribute property equally unless exceptional circumstances are involved."⁷¹ Furthermore, even Lenore Weitzman, whose sharp criticism of the effects of a no-fault regime on women has been the catalyst for much reassessment of divorce reform, has stated that she favors an equal division rule because of apprehension about unbounded judicial discretion.⁷² Thus, both an equality and an equity standard present problems, and persons animated by quite pragmatic considerations may differ on which is preferable.⁷³

Fineman does acknowledge that liberal feminists had practical concerns in mind in pressing for equality.⁷⁴ Her overwhelming emphasis, however, is on liberal feminists' embrace of the symbolic benefits of equal division. By presenting equality proponents as reformers who sought to advance ideological objectives at the economic expense of women, she fails to do justice either to them or to the complexity of the debate over property distribution standards.

A final problem with Fineman's analysis of property distribution is that she overemphasizes the importance of property division rules as the source of the economic disadvantage many women suffer after divorce. Most couples have relatively few assets available for distribution at the time of divorce. Marsha Garrison's recent study of negotiated divorce settlements in New York state, for instance, found that the median net worth of couples in contested divorce cases, a group likely to have more assets than the typical couple, was \$23,591.⁷⁵ Furthermore, on average only nineteen percent of the assets of these couples was in liquid form such as bank accounts, stocks, or bonds.⁷⁶ Put differently, the marital estate represented only about

70. *Id.* at 467 n.342.

71. *Id.* at 464. One recent study revealed that in 49 of 54 divorce cases women were relegated to one or a combination of the following . . . : less than a fifty percent overall share of marital property; short term maintenance after long term marriage; *de minimis* shares of business and professional practices which, in addition, the courts undervalued; terminable and modifiable maintenance in lieu of indefeasible equitable distribution or distributive awards; and inadequate or no counsel fee awards.

Harriet N. Cohen & Adria S. Hillman, *Is "Equitable Distribution" Fair? The New York Experience*, 4 N.J. FAM. LAW. 85 (1985).

72. WEITZMAN, *supra* note 1, at 108.

73. For a thoughtful discussion of the advantages and disadvantages of reliance on rules or discretion in the child custody context, see Carl E. Schneider, *Discretion, Rules, and Law: Child Custody and the UMDA's Best-Interest Standard*, 89 MICH. L. REV. 2215 (1991).

74. Pp. 28, 36; see also Martha L. Fineman, *Illusive Equality: On Weitzman's Divorce Revolution*, 1986 AM. B. FOUND. RES. J. 781, 786 (conceding that concern about judicial discretion is realistic, but concluding that its advantages outweigh its disadvantages).

75. See Garrison, *supra* note 1, at 662-63.

76. *Id.* at 666.

seven months' income for the median divorcing family.⁷⁷ As a result, Garrison concluded that for typical divorcing spouses, "no property division rule will make a substantial difference in economic well-being after divorce."⁷⁸

The primary economic asset of most households is the stream of future income that represents a return on career investment.⁷⁹ Men tend to have better future earnings prospects than women, for the various reasons described earlier.⁸⁰ As a result, as Steven Sugarman has argued, "[I]f women generally are going to fare significantly better in the couple's division of their financial interests on divorce, a convincing case is going to have to be made that they are entitled to more of their former husbands' postdivorce income than they now obtain."⁸¹

At the same time, divorce reform has significantly curtailed the availability of alimony, or "maintenance," payments, and has emphasized property division as the preferred means to provide for the economic needs of spouses at divorce.⁸² That this reorientation is taken quite seriously is reflected in several studies that have documented significant declines in recent years in both the frequency and amount of alimony awards.⁸³ The change in emphasis from alimony to property thus has blocked access to the marital asset that has the most potential to redress gendered economic disadvantage. To the extent that this change has hindered efforts to provide access to postdivorce income, it is a far more serious source of divorcing women's distress than the

77. *Id.* at 664.

78. *Id.* at 730; see also WEITZMAN, *supra* note 1, at 70-109 (describing paucity of assets available for division at divorce in California).

79. RHODE, *supra* note 62, at 150 ("Most couples' assets are primarily intangible, consisting of professional licenses, insurance, pensions, and related benefits not traditionally subject to marital property division."); WEITZMAN, *supra* note 1, at 110 (noting that the primary wealth of most divorcing families consists of "tangible and intangible assets that are acquired as a part of either spouse's career or career potential").

80. See *supra* notes 18-45 and accompanying text.

81. Sugarman, *supra* note 11, at 149; see also RHODE, *supra* note 62, at 150 (stating that "distribution of existing assets rather than future income" results in a "rather skewed concept of equity"); Garrison, *supra* note 1, at 730 ("It is now time to . . . plac[e] renewed emphasis on income and its post-divorce distribution.").

82. The UMDA, for instance, illustrates this orientation. UMDA § 308(a), 9A U.L.A. 347-48 (1988), provides that a court may order alimony only if it finds that the recipient (1) lacks sufficient property to provide for her needs and (2) is unable to support herself through employment, or is the custodian of a child whose condition or circumstances warrant that the custodian refrain from working outside the home. The comment to § 308 declares that the purpose of this section and of UMDA § 307 (relating to property division) is "to encourage the court to provide for the financial needs of the spouses by property disposition rather than by an award of maintenance." UMDA § 308 cmt., 9A U.L.A. 348 (1988). While the UMDA has been adopted in only a few states, "it has been widely influential as a source of ideas and as a model for law revision." GLENDON, *supra* note 4, at 227.

83. See, e.g., FIRST YEAR REPORT OF THE NEW JERSEY SUPREME COURT TASK FORCE ON WOMEN IN THE COURTS 77 (1984); STERIN ET AL., *supra* note 1, at 125-26; WEITZMAN, *supra* note 1, at 163-83; Garrison, *supra* note 1, at 83-86; McLindon, *supra* note 1, at 360-66.

adoption of an equal division standard.⁸⁴

Fineman mentions this change in allocation policy (pp. 40, 42), but her overwhelming emphasis on property distribution rules tends to obscure its significance. Moreover, when she does focus on it, she sees it simply as another instance of the power of equality rhetoric.⁸⁵ Certainly a preference for property division over alimony is consistent with images of equality and economic independence. Alimony historically has reflected an acknowledgement of dependence,⁸⁶ while property has powerful cultural appeal as a symbol of autonomy and self-reliance.⁸⁷ Those concerned with promoting notions of equality thus might well prefer a one-time lump-sum distribution of assets rather than the perpetuation of contact between an ex-wife and the ex-husband on whom she must rely to make regular alimony payments.

Yet I think that the story cannot be reduced simply to this. The image of equality is one strand in a more complex fabric of attitudes and understandings about marriage and its obligations, a fabric whose patterns have shifted dramatically over the past generation or so. Any attempt to summarize a zeitgeist risks reductionism. Nonetheless, with that caveat in mind, one way to characterize the general outline of this shift is as the continued advance of individualistic tenets that trace their roots at least as far back as the Enlightenment.⁸⁸ In the current age, these tenets are reflected in heightened awareness of and attention to the "inner" psychological life of the individual,⁸⁹ greater solicitude for "private" life as a vehicle for personal growth and self-development,⁹⁰ and increasing influence of the view that choice and consent should be the sources of personal obligation.⁹¹ Many persons now are more apt than a generation ago to see themselves as residents of what Lawrence Friedman calls "the republic of choice":⁹² a society

84. It is true that alimony has been awarded in only a small percentage of cases. See WEITZMAN, *supra* note 1, at 143-45. Prior to recent reforms, however, alimony was a transfer explicitly guided by the principle of addressing need. To the extent that changes in property distribution and alimony rules have deemphasized need, there is a weaker conceptual foundation for efforts to fashion remedies that would draw more extensively on postdivorce income.

85. P. 43; see also Fineman, *supra* note 74, at 790 (stating that characterization of increased earning power as property rather than as income available for maintenance is driven by the belief that "equality [is] the solution" to the economic problems of divorcing women).

86. See Reynolds, *supra* note 50, at 832 (stating that the traditional "dominant justification" of alimony is to "accommodate economic need").

87. See JENNIFER NEDELSKY, *PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM* 272-75 (1990) (reviewed in this issue by Professor Thomas W. Merrill — Ed.).

88. See FRED WEINSTEIN & GERALD PLATT, *THE WISH TO BE FREE: SOCIETY, PSYCHE, AND VALUE CHANGE* (1969).

89. See ROBERT N. BELLAH ET AL., *HABITS OF THE HEART* (1985); PHILIP RIEFF, *THE TRIUMPH OF THE THERAPEUTIC* (1966); CHARLES TAYLOR, *SOURCES OF THE SELF* (1989).

90. See ABRAHAM H. MASLOW, *TOWARD A PSYCHOLOGY OF BEING* (1962); CARL R. ROGERS, *ON BECOMING A PERSON* (1961).

91. See generally LAWRENCE M. FRIEDMAN, *THE REPUBLIC OF CHOICE* (1990).

92. *Id.* at 3.

committed to "the right to develop oneself, to build up a new life suited to oneself uniquely, to realize and aggrandize the self, through free, open selection among forms, models, and ways of living."⁹³

In family life, this is reflected in what has been called the movement "from role to self."⁹⁴ In simplified terms, roles prescribe certain standard reciprocal expectations of behavior among members of a social group.⁹⁵ By contrast, greater emphasis on the self envisions more individual latitude in fashioning one's obligations according to personal preference. Several observers have charted a movement in recent years toward greater attention to individual emotional satisfaction in family life, and toward an understanding of family relationships as more fluid and open-ended products of negotiation.⁹⁶ The result has been a diminishing sense of the family as a set of standard reciprocal moral relationships and a heightened sense of family life as an arena of psychological adjustment among unique individuals.

The result in family law has been the decline of what Carl Schneider has called "moral discourse."⁹⁷ No-fault divorce, for instance, proceeds on the assumption that the individuals involved are the only legitimate judges of whether a marriage should continue; unilateral no-fault divorce carries the logic of individualism to its conclusion, by proclaiming that either member of the marriage has the right to disavow the marriage as inimical to his or her personal interest. Similarly, the elimination of fault in many states as a consideration in economic and custody decisions at divorce is consistent with the tenet that blame has no place in analyzing the demise of a marriage, or at least that we have no consensual moral standards that might guide us in fixing such responsibility. The standard of psychological health demands that persons not be constrained by dysfunctional relationships and counsels that they should be able to move on to a better life without baggage from the old.

This is of course not all there is to modern family life; we also live amid competing images of communal devotion and sacrifice. I'm speaking of relative change in emphasis, not absolute transformation.⁹⁸ Furthermore, we have experienced gains from this movement

93. *Id.* at 2.

94. FRANCESCA M. CANCEAN, *LOVE IN AMERICA* 30 (1987).

95. See BRUCE J. BIDDLE, *ROLE THEORY: EXPECTATIONS, IDENTITIES, AND BEHAVIORS* (1979); ERVING GOFFMAN, *Role Distance*, in *ENCOUNTERS: TWO STUDIES IN THE SOCIOLOGY OF INTERACTION* 85 (1961); Jerold Heiss, *Social Roles*, in *SOCIAL PSYCHOLOGY: SOCIOLOGICAL PERSPECTIVES* 94 (Morris Rosenberg & Ralph H. Turner eds., 1981).

96. See BELLAH ET AL., *supra* note 89, at 3-26, 70-152; JOHN SCANZONI ET AL., *THE SEXUAL BOND: RETHINKING FAMILIES AND CLOSE RELATIONSHIPS* 142-88 (1989); JOSEPH VEROFF, ET AL., *THE INNER AMERICAN: A SELF-PORTRAIT FROM 1957 TO 1976*, at 118, 140-241 (1981); Pepper Schwartz, *The Family as a Changed Institution*, 8 J. FAM. ISSUES 455 (1987).

97. See Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803 (1985).

98. As family scholar Pepper Schwartz put it:

toward individualism, particularly with respect to women's position within the family. One consequence of the gradual displacement of moral discourse with psychological precepts, however, is greater difficulty in articulating any theory of continuing obligation beyond the end of a marriage.

This difficulty creates a crisis of legitimacy for alimony.⁹⁹ Alimony traditionally rested on an analytical foundation of moral reciprocity, which posited that a woman was entitled to the support of her husband in return for her performance of domestic responsibilities.⁹⁹ A husband deemed at fault in a divorce action for failure to fulfill his marital duties continued to be subject to his support obligation, for the law proclaimed that he could not unilaterally evade his responsibility by breaching the marital contract. Conversely, a wife's fault could relieve the husband of his duty of support and preclude receipt of alimony after divorce. We know that alimony actually was awarded in only a minority of cases, and that dispositions didn't invariably follow the logic of reciprocal duties. We also know that alimony was closely associated with gender roles that the law has now repudiated.¹⁰⁰ Nonetheless, a coherent analytical framework served to guide and justify alimony decisions.¹⁰¹ This framework reflected the notion that "people who marry take on special responsibilities for each other because of the commitment that defines marriage and because of the commitments that grow out of a shared life."¹⁰²

In the current age, however, as Professor Fineman observes, "the existence of a prior marital relationship has come to be considered insufficient justification for a continuing obligation."¹⁰³ The imposition of responsibility on this basis doesn't fit comfortably with height-

This is not to say that there is an absence of generosity or love [among family members]. It is *relative* emphasis that is important here, and the point is that the individual will not only come first, he or she will have a social structure that will allow individual agendas to be accomplished.

Schwartz, *supra* note 96, at 458.

99. See June Carbone & Margaret F. Brinig, *Rethinking Marriage: Feminist Ideology, Economic Change, and Divorce Reform*, 65 TUL. L. REV. 953, 976-77 (1991).

100. As the Supreme Court declared in *Stanton v. Stanton*, 421 U.S. 7, 14-15 (1975): "No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and world of ideas." See also *supra* note 13 (describing Supreme Court decisions striking down laws based upon assumption of traditional gender roles).

101. "Alimony awards, indeed divorce awards generally, were financially significant only for the small percentage of divorcing couples with substantial assets, but the disproportionate attention given to those cases served to reinforce, at a symbolic level, the importance of marital responsibilities." Carbone & Brinig, *supra* note 99, at 978 n.114.

102. Carl E. Schneider, *Rethinking Alimony: Marital Decisions and Moral Discourse*, 1991 B.Y.U. L. REV. 197, 257. Judith Areen is more cautious about attributing such a historical rationale to alimony. She observes that it arose at a time at which divorces were rarely if ever granted and was adopted in the postdivorce context without any explicit discussion. See JUDITH AREEN, *FAMILY LAW: CASES AND MATERIALS* 592 (2d ed. 1985).

103. P. 40; see also JACOB, *supra* note 4, at 167 ("[N]ew laws conclude that ex-husbands have only a transitory responsibility for their former wives' welfare after divorce.").

ened emphasis on individual choice and freely assumed obligation. As a result, we are struggling mightily to formulate an ethic of postdivorce responsibility that seems more consistent with contemporary solicitude for self-development and with greater suspicion of the past as a constraint on personal growth.¹⁰⁴ In the face of this difficulty, the image of a "clean break" between divorcing spouses gains considerable appeal.¹⁰⁵ Lump-sum property division with minimal alimony is the natural expression of this philosophy. For persons disengaging from a relationship of mutual dependence, it offers a stock of capital to each that will permit "[t]he construction of a new life through the market."¹⁰⁶ With forty acres and a mule, the individual can strike out on her own toward the promised land of autonomy.

Thus, precisely when the most important marital assets are more difficult to conceptualize as property, and when a claim on future income is increasingly important, we seem less and less able to offer a theory of postdivorce obligation. It is not merely, as Fineman argues, that we are unwilling to acknowledge need. It is that we seem to be less willing to conclude that a former spouse should be the one to meet that need. Furthermore, this is not the result simply of equality rhetoric, but of a complex dialectic between individualism and equality. Greater emphasis on the individual as a sovereign apart from social relationships leads naturally to the embrace of formal equality, which posits the abstract similarity of all individuals. In turn, this formulation reinforces our understanding of persons as fundamentally asocial entities, for whom nonconsensual obligation based on the mere fact of a prior relationship seems unfair.

Professor Fineman's relentless criticism of equality thus leads her to focus excessively on property distribution rules, and by and large to neglect both the importance and complex roots of a declining willingness to impose alimony. Her analysis of changes in economic ordering at divorce thus ultimately offers a critique of only a small part of the picture, which does not grapple with the more complicated texture of divorce reform and economic disadvantage. What kinds of theories of postdivorce obligation can we formulate in a postfault world? Should

104. For one attempt to formulate a basis for postdivorce assistance, see Ira M. Ellman, *The Theory of Alimony*, 77 CAL. L. REV. 1 (1989). For critiques of Ellman, see June Carbone, *Economics, Feminism, and the Reinvention of Alimony: A Reply to Ira Ellman*, 43 VAND. L. REV. 1463 (1990); Schneider, *supra* note 102. Ellman's reply to Schneider is contained in Ira M. Ellman, *Should the Theory of Alimony Include Nonfinancial Losses and Motivations?*, 1991 B.Y.U. L. REV. 259. For other discussions of possible analytical models for alimony, see Carbone & Brinig, *supra* note 99; Mary E. O'Connell, *Alimony After No-Fault: A Practice in Search of a Theory*, 23 NEW ENG. L. REV. 437 (1988); June Rutheford, *Duty in Divorce: Shared Income As a Path to Equality*, 58 FORDHAM L. REV. 539 (1990); Sugarman, *supra* note 11.

105. See, e.g., Kay, *supra* note 62, at 313 (characterization of future earning capacity as property "is inconsistent with the no-fault philosophy that seeks to achieve a clean break between spouses to enable each to begin a new life").

106. Marcus, *supra* note 62, at 457.

we reject the dichotomy between property and alimony in favor of an approach that draws on characteristics of each? Even if we can construct them, do we have any reason to believe that we can enforce such obligations, given our dismal experience with delinquent child support payments?¹⁰⁷ Are the economic benefits of alimony outweighed by the perpetuation of a woman's dependence on her ex-husband? Should there be greater public sector involvement in addressing the financial distress divorce often creates? If so, will that weaken even further men's sense of continuing responsibility? We must confront a host of questions such as these, and Fineman elsewhere has shown her sensitivity to some of them.¹⁰⁸ In this book, however, the insight she offers is limited by an overly narrow focus on an equality rule in property division.

IV. GENDER AND CUSTODY

Fineman argues that equality rhetoric also appears in child custody law, in the form of greater legal support for joint custody. In 1975, only one state had any statutory provision for joint custody; more than half the states now have such a law.¹⁰⁹ Furthermore, courts in some states without a joint custody statute have established such an arrangement through common law adjudication.¹¹⁰ Many states permit a court to impose a joint custody arrangement over the objection of one of the parents,¹¹¹ and some states have established a presumption that joint custody is in the best interests of the child.¹¹² These developments, Fineman argues, represent the principle of "equal division" as applied to the issue of custody (p. 163).

The custody law that immediately preceded recent divorce reforms by and large benefited women. First, it considered marital fault in determining which parent should be awarded custody, a practice that usually favored mothers. Second, the law generally presumed that mothers should be awarded custody of at least those children of

107. See GLENDON, *supra* note 4, at 232; Nan D. Hunter, *Child Support Law and Policy: The Systematic Imposition of Costs on Women*, 6 HARV. WOMEN'S L.J. 1 (1983).

108. See Fineman, *supra* note 74.

109. See Appendix A: *Joint Custody Statutes and Judicial Interpretations*, in JOINT CUSTODY AND SHARED PARENTING 297-331 (Jay Folberg ed., 2d ed. 1991) [hereinafter *Joint Custody Appendix*].

110. See, e.g., *Beck v. Beck*, 432 A.2d 63 (N.J. 1981).

111. *Joint Custody Appendix*, *supra* note 109, at 297-331.

112. *Id.* Joint custody actually can involve either joint *physical* or joint *legal* custody. Under a joint physical custody arrangement, the child spends a roughly equivalent amount of time residing with each parent. With joint legal custody, the parents are accorded the right to participate equally in major decisions affecting the child, such as choice of religion, choice of school, or significant medical care. Fineman does not distinguish between the two in her discussion. Her emphasis on the possibility that women's ties with their children might be severed seems to imply, however, that her focus is primarily on joint physical custody.

"tender years."¹¹³ The first blow to this system occurred when many states eliminated fault as a consideration in custody proceedings. The second occurred, Fineman argues, when liberal feminists insisted on the adoption of gender-neutral rules in family law as a "symbolic imperative" (p. 80).

Fineman maintains that these developments paved the way for fathers' rights groups to draw on feminist equality rhetoric in pressing for joint custody as a matter of equal rights for men (pp. 81, 87-89). These groups claimed that mothers had no distinctive parental competence superior to that of fathers, a position that was seen as consistent with liberal feminist rejection of gender stereotypes (pp. 88-89). Men's groups asserted the unfairness of a system that they claimed "always gave mothers custody and treated [men] as nothing more than 'walking wallets'" (p. 88).

Men were assisted in their campaign by members of the "helping professions" — psychologists, social workers, and others who provide emotional counseling. With the loss of relatively predictable rules or presumptions, courts were confronted with the need to decide each case on the basis of the open-ended standard of the "best interests of the child." Counseling professionals moved in to fill this vacuum, Fineman says, by promoting their expertise in assessing the likely psychological consequences of different custody arrangements in individual cases. They offered social science research as a source of guidance to courts otherwise adrift in a highly subjective and speculative exercise. Furthermore, Fineman argues, they relied upon therapeutic rhetoric to push for moving the custody determination out of the adversarial court system and into the ostensibly more conciliatory realm of mediation (pp. 144-69). As experts in counseling, they were the logical parties to supervise this process and to provide recommendations to the court as to which custody arrangement was preferable.¹¹⁴

Fineman observes that these procedural reforms contained a substantive component: the model of shared postdivorce parenting as the ideal form of custody. This model emphasizes the importance of the continued involvement of both parents in the child's life, regardless of the level of past participation in child rearing. This model is based in part on social science research emphasizing the significance and distinctiveness of fathers' contributions. From this perspective, requests for sole custody are suspect. They are likely to be seen as the product of the unresolved hostility of one parent toward the other, rather than

113. The age varied, but generally was up to ten or eleven years old. Jamil S. Zainaldin, *The Emergence of a Modern American Family Law: Child Custody, Adoption, and the Court, 1796-1851*, 73 NW. U.L. REV. 1038, 1085 (1979).

114. For example, see the California divorce mediation process described in Robert H. Mnookin et al., *Private Ordering Revisited: What Custodial Arrangements Are Parents Negotiating?*, in *DIVORCE REFORM*, *supra* note 9, at 37, 41.

sentiment based on concern for the child's best interest. Thus, Fineman concludes, liberal feminists, fathers' rights groups, and psychological professionals all have combined to press successfully for an increased legal preference for joint custody (pp. 79-143).

Fineman argues that joint custody awards in cases in which neither parent genuinely favors it has created serious problems for women. Joint custody has "profoundly affect[ed] bargaining power between spouses at divorce" (p. 150), because men now plausibly can threaten a custody challenge and extract economic concessions in return for withdrawing it. Furthermore, women who have devoted themselves to childrearing now are more vulnerable to disruption of the bond with their children. Mothers typically see joint custody as a loss, while fathers see it as a victory (p. 164), and today, Fineman argues, "a man who pursues a custody case has a better than equal chance of gaining custody" (p. 90).

The continuous contact between parents that is necessary under joint custody also may cause problems by prolonging and exacerbating conflict, resulting in emotional stress for both parents and children. Accordingly, Fineman argues, it may increase an ex-husband's control over his ex-wife and children (p. 164). Moreover, granting a father joint legal custody while the mother retains physical custody can give a father rights without any commensurate day-to-day responsibilities. Joint custody also invites greater ongoing state supervision over the postdivorce family unit, because of the enhanced possibility of child-rearing conflicts between mothers and fathers. Finally, Fineman argues, joint custody devalues the disproportionate amount of caretaking that mothers typically provide, proclaiming instead that the father's mere tie of biology should give rise to equal parental rights.

Fineman devotes considerable space to demonstrating that the studies on father custody that have served as the empirical underpinning for joint custody are much less conclusive than proponents contend (pp. 127-43). Given this, and given the myriad ways in which she believes joint custody laws disadvantage women, Fineman suggests that courts should adopt a presumption that custody should be awarded to the parent who has been the primary caretaker of the child during the marriage.¹¹⁵ This rule is formally gender-neutral but would reward the nurturing behavior that mothers normally provide under the current gendered division of labor system. Furthermore, it would emphasize factfinding about past behavior, rather than speculation about future behavior, and thus would require "an inquiry traditionally performed by courts" (p. 182).

Fineman's critique of joint custody echoes that of several other

115. P. 181; see, e.g., *Garska v. McCoy*, 278 S.E.2d 357 (W.Va. 1981); see also Richard Neely, *The Primary Caretaker Parent Rule: Child Custody and the Dynamics of Greed*, 3 YALE L. & POLY. REV. 168 (1984).

critics who have characterized this development as detrimental to women.¹¹⁶ In addition, her description of the influence of fathers' rights organizations in pushing for joint custody appears supported by the historical evidence.¹¹⁷ Her account of the movement for joint custody evinces a sensitive and perceptive awareness of the ways in which rhetoric helps constitute our social world, shaping our understanding of both our situation and the possibilities for responding to it. Her close analysis of the literature on father custody underscores the perils of uncritical acceptance of social science research and the importance of eschewing broad pronouncements in favor of attention to nuance and context. Fineman thus undermines any lingering notion that joint custody is an unqualified good, a happy solution to the conflict that often attends the issue of child custody.

Yet Fineman herself succumbs to the impulse toward absolutism in her categorical denouncement of joint custody. While literature on the effects of various custody arrangements is still in an early stage, research suggests that joint custody may work well or ill depending on a variety of factors that characterize different situations.¹¹⁸ This literature has explored the effect of joint custody on matters such as parental hostility, payment of child support, visitation, the well-being of children, and continued litigation under a variety of conditions. At a minimum, it indicates that we should neither accept nor reject joint custody uncritically, but must be cognizant of particularities in assessing its propriety in various situations. The dangers of categorical thinking are also articulated by Katharine Bartlett and Carol Stack, who caution that statements about the effect of joint custody on women as a group ignore racial and socioeconomic differences among women that affect the way custody arrangements are perceived and experienced.¹¹⁹ Given Professor Fineman's emphasis on the empirical effects of law and her subtle analysis of the research on father custody,

116. See Ramsey L. Klaff, *The Tender Years Doctrine: A Defense*, 70 CAL. L. REV. 335 (1982); Nancy D. Polikoff, *Why Are Mothers Losing: A Brief Analysis of Criteria Used in Child Custody Determinations*, 7 WOMEN'S RTS. L. REP. 235 (1982); Jana B. Singer & William L. Reynolds, *A Dissent on Joint Custody*, 47 MD. L. REV. 497 (1988); Rana K. Uviller, *Fathers' Rights and Feminism: The Maternal Presumption Revisited*, 1 HARV. WOMEN'S L.J. 107 (1978).

117. See JACOB, *supra* note 4, at 137-38.

118. See, e.g., DEBORAH A. LUEPNITZ, *CHILD CUSTODY* (1982); Alice Abarbanel, *Shared Parenting After Separation and Divorce: A Study of Joint Custody*, 49 AM. J. ORTHOPSYCHIATRY 320 (1979); W. Glenn Clingempeel & N. Dickon Reppucci, *Joint Custody After Divorce: Major Issues and Goals for Research*, 91 PSYCHOL. BULL. 102 (1982); Susan Steinman, *Joint Custody: What We Know, What We Have Yet to Learn, and the Judicial and Legislative Implications*, 16 U.C. DAVIS L. REV. 739 (1983); Susan B. Steinman et al., *A Study of Parents Who Sought Joint Custody Following Divorce: Who Reaches Agreement and Sustains Joint Custody and Who Returns to Court*, 24 J. AM. ACAD. CHILD PSYCHIATRY 554 (1985). For an examination of the limitations of many of the joint custody studies that have been done thus far, see Elizabeth Scott & Andre Derdeyn, *Rethinking Joint Custody*, 45 OHIO ST. L.J. 455, 484-95 (1984).

119. Katharine T. Bartlett & Carol B. Stack, *Joint Custody, Feminism, and the Dependency Dilemma*, 2 BERKELEY WOMEN'S L.J. 9 (1986).

it is puzzling that she is not more grounded and discriminating in her assessment of joint custody.

One study Fineman may not have had the opportunity to consult before publication — that conducted by Mnookin, Macoby, Albiston, and Depner — is perhaps the most comprehensive study of custody to date. Its authors conclude that their study “contradict[s] the claims of those who suggest that mothers are losing custody in a high proportion of cases.”¹²⁰ Nearly eighty percent of physical custody cases involved no conflict between mothers and fathers. Mothers’ requests for custody were submitted more than ten times as often in these cases as fathers’ requests, and the mother received sole custody in 90% of these cases.¹²¹ In cases of conflict, mothers’ requests were granted twice as often as fathers’.¹²² When each parent sought sole physical custody, women won 46% of the cases and men 9.6%.¹²³

In the county for which historical data were available, the study found that joint legal custody had increased from 25% in 1979 to 79% in 1985-1988.¹²⁴ Because mothers are awarded sole physical custody in a large percentage of cases and have de facto physical custody even in many instances of joint custody or father custody, however, the authors question the practical significance of this shift.¹²⁵ The study did not attempt to determine the extent to which custody challenges might be used as economic bargaining ploys, but some evidence at least suggests that they were not. Less than 9% of the fathers asked for more custody than they actually desired,¹²⁶ and nearly 35% of the fathers asked for less custody than they really wanted.¹²⁷ In addition, the award of joint legal custody was not significantly related to the amount of the child support granted, which suggests that “custodial mothers did not substantially compromise on child support to keep sole legal custody.”¹²⁸ Some of the dire predictions about joint custody thus may be unfounded.

Furthermore, an article presenting data from the same study indicates that joint legal custody was not strongly associated with greater

120. Mnookin et al., *supra* note 114, at 71.

121. *Id.* at 52.

122. *Id.* at 53.

123. *Id.* at 54. The remainder of the cases were resolved by awarding joint custody.

124. *Id.* at 59. Joint physical custody in both counties under study was awarded about in about 20% of the cases. *Id.* at 67.

125. Some 39.6% of formal joint physical custody arrangements were de facto mother custody, as were 23% of formal father custody arrangements. *Id.* at 67.

126. *Id.* at 49. Some 5.1% of the women did the same. *Id.*

127. *Id.* at 49. Only 12.2% of the mothers did the same. *Id.*

128. Catherine R. Albiston et al., *Does Joint Legal Custody Matter?*, 2 STAN. L. & POLY. REV. 167, 176 (1990). It is reasonable to believe, however, that concern over retaining sole physical custody might create more incentive to make economic concessions, particularly if the authors are correct that joint legal custody is seen as no significant threat to a mother's everyday control over the child.

contact between fathers and their children,¹²⁹ with more involvement in either everyday or major decisions about the child,¹³⁰ with greater compliance with child support orders once income was accounted for,¹³¹ or with payment for extra items for the child.¹³² Overall, "though policies concerning standards for custody decisions may be gender-neutral, social realities still produce gender differentiation between parents."¹³³ Thus, some of the aspirations of joint custody proponents also appear to be unfulfilled. Joint custody seems to be neither as bad nor as good as its opponents and supporters respectively claim.

Fineman might well argue that this research supports her view that the primary caretaker presumption is preferable because joint custody creates more potential for bargaining abuse and maternal disruption without providing any concomitant benefits. This seems plausible enough.¹³⁴ Yet Fineman fails to confront a powerful argument against the primary caretaker presumption: that it perpetuates gendered patterns of childrearing. Fineman acknowledges that the presumption will tend to result in more mothers than fathers obtaining custody, but says that she "refus[es] to accept . . . that there is a problem, legal or social, with the fact that mothers continue to receive custody of their children in large numbers" (p. 118). Rather, she argues, "if we value nurturing behavior, then rewarding those who nurture seems only fair" (p. 183).

Fineman's argument has considerable appeal. Her apparent lack of concern about the disparate gender impact of the presumption, however, stems from what is probably the most serious problem in her book: her cramped view of law as the mere reflection of social attitudes. On her view, it is simply misguided to look to law to help reshape relations between men and women. To worry about the "message" that law may be sending, she maintains, is to pursue the chimerical "symbolic" benefits that have led so many feminists astray. It is worth exploring this position in more detail, because it shows how

129. *Id.* at 172-73.

130. *Id.* at 173-74.

131. *Id.* at 176.

132. *Id.*

133. Mnookin et al., *supra* note 114, at 74.

134. A study of Minnesota's experience with the primary caretaker presumption, however, injects a note of caution. The study found that adoption of the presumption "caused an explosion of litigation," primarily over the issue of which parent was the primary caretaker. Gary Crippen, *Stumbling Beyond Best Interests of the Child: Reexamining Child Custody Standard-Setting in the Wake of Minnesota's Four Year Experiment with the Primary Caretaker Preference*, 75 MINN. L. REV. 427, 452 (1990). The uncertainty resulting from increased litigation suggests that the presumption may create the opportunities for bargaining abuse for which Fineman condemns the joint custody preference. The Minnesota legislature ultimately rejected the presumption, requiring courts to consider multiple factors under the best interests standard. *Id.* at 428-29.

Fineman's analysis of both the economic and custody aspects of divorce is vulnerable to the very charge that she levies against liberal feminists — namely, that they fail to take into account the background system of gender in which we all live.

V. LAW, BEHAVIOR, AND CULTURAL MEANING

Professor Fineman is emphatic in declaring that her analysis “assumes the relative powerlessness of law to transform society as compared to other ideological institutions of social constitution within our culture” (p. 10). The mistake of the liberal feminists, she argues, was their assumption that law could be used as “the instrument of social change” (p. 10). A more realistic assessment, she maintains, is that law is “more a mirror than a catalyst” (p. 11), which can “seldom if ever be used to initiate” social change.¹³⁵ Family law should be based not on “grand theoretical abstractions,” but on the actual circumstances of women and children (p. 11).

Fineman thus sees the options for conceptualizing law as binary: law is either an independent or dependent variable, either a cause or effect of social attitudes. Since she sees law as primarily passive reflection, she argues that it should simply address those in need, without attending to unfounded concerns about the broader message that law may be sending. Fineman regards her approach as a hardheaded, pragmatic focus on the “real” material world that people occupy, a world in which law is simply the vehicle for effectuating the desires that arise independently of the legal universe.

It is surely wise to harbor some skepticism about claims that law can transform social attitudes. There may be particular temptation for lawyers and legal academics to overemphasize the changes that law can produce, and to underemphasize the stubborn persistence of habits of mind that have been forged in the context of daily existence. Too many of us are acutely aware of the gap between the law on the books and the law as lived to be overly sanguine that the formal proclamation of ideals will necessarily cause a realignment of beliefs and behavior. Furthermore, undue attention to law as a vehicle for social change may deflect energy away from more broadly based political efforts that have greater promise for changing consciousness in a more enduring fashion.¹³⁶

Caution and healthy skepticism need not lead, however, to categorical rejection of law as an influence in the formation of attitudes.

135. P. 10; see also pp. 10-11 (“No matter what the formal legal articulation, the implementation of legal rules will track and reflect the dominant conceptualization and conclusions of the majority culture.”).

136. See GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991) (reviewed in this issue by Professor Stephen L. Carter. — Ed.); Girardeau A. Spann, *Pure Politics*, 88 MICH. L. REV. 1971 (1990).

The assumption that law is merely effect is as simplistic as the assumption that it is simply cause; neither position does justice to the complex relationship among law, behavior, and culture. Fineman's categorical embrace of one polar position leaves her open to criticism that she ignores at least two more sophisticated conceptions of law, each of which can be used to argue that her approach to the economic and custody consequences of divorce may perpetuate a gender system that will continue to disadvantage women. These criticisms are not necessarily conclusive. Fineman's failure to confront them, however, detracts from the force of her argument and reflects a missed opportunity to make a richer and more subtle contribution to the debate about divorce reform.

The first conception is of law as the provision of a set of incentives, which affects the costs and benefits of various alternative courses of action.¹³⁷ From this perspective, a divorce regime that allocates children and a greater share of economic assets to the person who assumed more domestic responsibility during the marriage lowers the costs associated with forgoing employment opportunities outside the home. To the extent that we compensate a spouse at divorce for these forgone opportunities, we eliminate at least any economic disincentives to concentrate on the domestic rather than the market sphere. Observers who believe that we should encourage selfless behavior that furthers shared spousal interests acknowledge this connection between incentives and behavior, and argue that the failure adequately to compensate the spouse who devotes herself to household needs will ultimately reduce the willingness to engage in unselfish behavior.¹³⁸

A commitment to rewarding the assumption of domestic responsibility can be couched in gender-neutral terms, so that either husband or wife is the potential beneficiary. The existing gender system, however, makes it much more likely that women rather than men will find their cost-benefit calculus affected by such measures. We know that women generally earn less income than men, and that their career opportunities tend to be more circumscribed than those of their male counterparts.¹³⁹ The costs of forgoing market activity are thus lower for women than for men. We also know that socialization¹⁴⁰ often results in women's higher valuation of the benefits available from child

137. See Sugarman, *supra* note 11, at 141-42 (stating that one way to see divorce law is as set of behavioral incentives). Perhaps the most prominent example of this orientation is law and economics. See, e.g., A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS (1983); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (1972).

138. See, e.g., RHODE, *supra* note 62, at 154 ("If we wish to encourage sharing relationships, we cannot continue to penalize sharing behavior."); Prager, *supra* note 42, at 12 (noting that marital property law's failure to reflect sharing principles may discourage cooperative behavior).

139. See *supra* notes 18-45 and accompanying text.

140. And perhaps biology, though that is a more controversial proposition. See generally THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCE (Deborah Rhode ed., 1990).

rearing. An increase in the benefits available from domestic specialization, or, put differently, a decrease in the costs, thus is likely to make the domestic option attractive to many more women than men.¹⁴¹ As a result, short-term measures intended to address women's dependency may encourage a pattern of choices that perpetuates that dependency in the long run, preventing many women from becoming self-supporting economic actors.

This potential for reinforcement of the gender system is underscored by the fact that economists who see efficiency gains from the traditional division of labor within the household advocate generous economic compensation for women at the time of divorce.¹⁴² These analysts deem such compensation necessary in order to induce women to invest in household as opposed to market skills in the face of uncertainties about the length of the marriage. Without a transfer of assets at divorce, Elizabeth Landes has argued, "the wife's desired level of home production would fall substantially short" of the optimum.¹⁴³ An efficient level of alimony thus will "encourage efficient resource allocation within marriage"¹⁴⁴ to the extent that it "approximate[s] the value of the wife's forgone opportunities from entering the marriage."¹⁴⁵

The dilemma posed by a desire both to help those in need and to avoid the creation of incentives that reinforce women's dependence is reflected in the work of Professor Herma Hill Kay. On the one hand, Professor Kay favors adequate compensation for at least some wives who have sacrificed career opportunities for homemaking responsibilities.¹⁴⁶ On the other hand, she argues that we should "withdraw existing legal supports" for the "division of function by sex within marriage."¹⁴⁷ This is necessary, she maintains, because women's position will never improve as long as they continue to "make choices that will be economically disabling."¹⁴⁸ As June Carbone and Margaret Brinig have pointed out, the logical conclusion of Kay's second sug-

141. See RHODE, *supra* note 62, at 165 (noting that women who make investments in human capital still progress more slowly than men, which makes concentration on household responsibilities more appealing than it is to men).

142. GARY S. BECKER, A TREATISE ON THE FAMILY 14-37 (1981); Lloyd Cohen, *Marriage, Divorce, and Quasi Rents; Or, "I Gave Him the Best Years of My Life,"* 16 J. LEGAL STUD. 267 (1987); Elizabeth M. Landes, *Economics of Alimony*, 7 J. LEGAL STUD. 35 (1978).

143. Landes, *supra* note 142, at 46. This is because the wife has a greater proportion of investment in activities that are "marital specific," such as "child care and development, meal preparation, home repair, and activities that contribute generally to the health and welfare of the family" that would be "less valuable if the marriage were to dissolve." *Id.* at 40.

144. *Id.* at 58.

145. *Id.* at 49.

146. Herma Hill Kay, *Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath*, 56 U. CIN. L. REV. 1, 79-80 (1987).

147. *Id.* at 85.

148. *Id.* at 80.

gestion is that we should provide women with "less, not more, financial support upon divorce."¹⁴⁹ Kay's difficulty in reconciling her two positions reflects how complicated our assessment of the best course of action becomes when we acknowledge that law may produce incentives for certain types of behavior. With respect to divorce law, this perspective requires that we at least confront the possibility that short-term attention to need may reinforce choices that perpetuate long-term dependency.

Even if we are skeptical about family law's capacity to provide incentives to which persons respond, a second conceptualization of law might also serve as the basis for a critique of Fineman's analysis. This is the view that law plays a part in creating cultural meaning — those understandings of self, others, and the world at large that make it possible for people "to imagine principled lives they can practicably lead."¹⁵⁰

This perspective rejects the idea that law is either (or even primarily) cause or effect. Rather, it is both: an active element in the shaping of culture that at the same time cannot help but be influenced by that culture. Law is one way among many that a culture attempts to impose a meaningful order upon events.¹⁵¹ As self-interpreting beings, we live by narratives that purport to bestow coherence upon the tangled and fragmented world of sense impressions. Law is one source of narrative, a cultural practice that "gives us our terms for constructing a social universe by defining roles and actors and by establishing expectations as to the propriety of speech and conduct."¹⁵² Locating ourselves within this universe, we can see ourselves as participants in an ongoing story, in which some things are worthy of praise and others of blame, and in which we can imaginatively expand our sense of self both backward into history and forward into the future.

This focus on structures of meaning finds problematic the assumption of a disjunction between the material and symbolic world. Rather, material circumstances give rise to certain forms of symbolic action, which in turn provide particular interpretations of material

149. Carbone & Brinig, *supra* note 99, at 994.

150. CLIFFORD GEERTZ, *Fact and Law in Comparative Perspective*, in LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY 167, 234 (1983); see, e.g., MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW (1987); JAMES BOYD WHITE, HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW (1985) [hereinafter HERACLES' BOW]; JAMES BOYD WHITE, WHEN WORDS LOSE THEIR MEANING (1984); Katharine T. Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293 (1988); Bartlett & Stack, *supra* note 119. A sympathetic but cautionary note is sounded in Carol Weisbrod, *On the Expressive Functions of Family Law*, 22 U.C. DAVIS L. REV. 991 (1989).

151. "What Frank O'Hara said of poetry, that it makes life's nebulous events tangible and restores their detail, may be true as well, and no less variously accomplished, of law." GEERTZ, *supra* note 150, at 182.

152. JAMES BOYD WHITE, *Rhetoric and Law: The Arts of Cultural and Communal Life*, in HERACLES' BOW, *supra* note 150, at 29, 36; see also Bartlett & Stack, *supra* note 119, at 28 (stating that, to the extent that law influences ideology, it affects how persons interpret events).

life. Linguistic scholars, for instance, have suggested how our physical embodiment gives rise to certain cognitive models, which we then project onto new and more abstract situations through the use of metaphor.¹⁵³ The symbolic deployment of metaphor is thus central to our functioning within the world, an exercise that is rooted in material circumstances even as it offers interpretive models for making sense of those circumstances.

Fineman therefore is simplistic when she claims that what distinguishes her analysis is her "belief in the desirability of basing law on what is concrete rather than what is abstract" (p. 7). This assertion suggests a dichotomy between material and symbolic realms and seems to posit some basic sphere of "real life" unmediated by interpretive abstractions. Yet symbolic self-understandings, aspirations, and images of conduct are as "real" as anything else, because they are woven into the fabric of meaningful everyday experience. The assumption that law is properly associated only with a self-contained material world fails to recognize that law consists of a stock of symbols that represent "a distinctive manner of imagining the real."¹⁵⁴

This integration of the material and the symbolic is particularly apparent in family life. It is within the family that we come to full consciousness as distinct human beings in a world of other beings; we first encounter joy, rage, love, jealousy, anger, altruism, and a host of other emotions in our interaction with other family members. These experiences serve powerfully to inform our understanding of more abstract basic moral concepts, which in turn provide cues about the propriety of specific behavior and expressions of emotion in particular instances.¹⁵⁵ Family life, then, is the realm in which we first experience the imposition of narrative coherence upon primal sensation. Put differently, it is where we hear our first stories about what it means to be human. Not surprisingly, then, as Fineman herself acknowledges,

153. See MARK JOHNSON, *THE BODY IN THE MIND: THE BODILY BASIS OF MEANING, IMAGINATION, AND REASON* (1987); GEORGE LAKOFF, *WOMEN, FIRE, AND DANGEROUS THINGS: WHAT CATEGORIES REVEAL ABOUT THE MIND* (1987); GEORGE LAKOFF & MARK JOHNSON, *METAPHORS WE LIVE BY* (1980). In a series of insightful articles, Steven Winter has explored the implications of this understanding for legal theory. See, e.g., Steven L. Winter, *Bull Durham and the Uses of Theory*, 42 STAN. L. REV. 639 (1990); Steven L. Winter, *Indeterminacy and Incommensurability in Constitutional Law*, 78 CAL. L. REV. 1441 (1990); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371 (1988); Steven L. Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law*, 137 U. PA. L. REV. 1105 (1989); Steven L. Winter, *Death is the Mother of Metaphor*, 105 HARV. L. REV. 745 (1991) (book review).

154. GEERTZ, *supra* note 150, at 184.

155. See JAMES R. AVERILL, *ANGER AND AGGRESSION: AN ESSAY ON EMOTION* (1982); James R. Averill, *The Social Construction of Emotion: With Special Reference to Love*, in *THE SOCIAL CONSTRUCTION OF THE PERSON* 89 (Kenneth J. Gergen & Keith E. Davis eds., 1985). See generally the essays contained in *THE SOCIAL CONSTRUCTION OF EMOTIONS* (Rom Harré ed., 1986).

discourse about the family is "highly emotionally charged and fraught with symbolism" (p. 17).

Family law is one source of narrative about what it means to inhabit this world of the family. It offers certain models and aspirations that are intended to guide behavior, perhaps less by manipulating the calculus of costs and benefits than by promoting the adoption of particular self-understandings. People draw a sense of what it means to be a husband, wife, or parent in part from the expectations expressed in law, even if they do not respond directly to the existence of a given rule. People who inhabit worlds in which spouses must prove fault to the satisfaction of the state in order to divorce, or in which minors must obtain parental consent to obtain an abortion, or in which the state equalizes the standard of living of divorcing spouses, do not just live in different material worlds from people who are subject to different legal rules. To some degree, they also inhabit different conceptual worlds, defined by distinct sets of norms and values on which people rely in assessing different courses of action.

Several recent scholars have emphasized that divorce law shapes the expectations that persons bring to marriage, because the enforcement of some obligations and not others necessarily provides an indication of what it *means* for two persons to be married to one another.¹⁵⁶ Lenore Weitzman, for example, has expressed concern that a decline in financial assistance for dependent spouses at divorce not only has visited economic hardship, but "has altered the obligations of the marriage contract, and, as a result, is creating new norms and new expectations for marriage and family commitments in our society."¹⁵⁷ Professor Fineman acknowledges that "divorce rules symbolically reflect more than what is considered to be appropriate legal policy," and that they "also stand as eloquent statements about society's views on the nature of family and marriage" (p. 12). She does not, however, see those statements as having any effect on self-understanding. Rather, for Fineman the causal arrow seems to run in only one direction; law is simply the empty vessel into which we pour our social attitudes.

Fineman's narrow view of the relationship between law and culture leaves her vulnerable to charges that her proposals might send a message that current gender arrangements are desirable and inevita-

156. See KEVIN J. GRAY, *REALLOCATION OF PROPERTY ON DIVORCE* 1 (1977) (stating that the law of property division at divorce "affords a peculiar wealth of commentary on such matters as the prevailing ideology of marriage, the cultural definition of the marital roles, the social status of the married woman and the role of the state *vis-à-vis* the family"); RHODE, *supra* note 62, at 149 ("Policies concerning marital dissolution have always given important signals about gender roles and cultural priorities.").

157. WEITZMAN, *supra* note 1, at xv; see also Reynolds, *supra* note 50, at 904 (noting that judicial decisions regarding property division "appear[] to have concluded that the availability of no-fault divorce has redefined marriage so that spouses no longer assume that they may have commitments to the other that survive divorce").

ble. Specifically, given the backdrop of the existing gender system, divorce law that treats economic transfers and custody as a "reward" for concentrating on household tasks may reinforce the message that domesticity is a viable alternate career for women. Internalization of this understanding by both men and women would perpetuate the traditional division of labor, prompting a wife to forgo career investment even though "[e]mployment is likely to make women more economically self-sufficient, at least in the long run."¹⁵⁸

Rejection of joint custody in favor of the primary caretaker has met with particularly pointed criticism on this ground. Katharine Bartlett and Carol Stack have maintained that "[t]he feminist critique of joint custody recognizes 'reality,' but only part of it, and perpetuates antiegalitarian norms that contribute to the continuation of this reality."¹⁵⁹ They have cautioned that greater assurance that women will gain custody may provide short-term benefits, but at the cost of furthering stereotypes that "women usually will (read, *should*) take primary responsibility for the caretaking of children."¹⁶⁰ While the primary caretaker presumption is formally gender neutral, "it leaves untouched a non-neutral and discriminatory reality" in which women remain economically dependent because of their concentration on child rearing.¹⁶¹ Favoring the primary caretaker thus takes the status quo as given, an approach dictated by the assumption that law is powerless to change social attitudes.¹⁶²

According to Bartlett and Stack, by contrast, joint custody offers an alternative vision of parental responsibilities, which assumes that "both parents should, and will, take important roles in the care and nurturing of their children."¹⁶³ They argue that custody law shouldn't be used to reward parents who "earn" the "right" to custody, because that orientation fosters an understanding of parental responsibilities as contingent.¹⁶⁴ Rather, law should express the ideal that nurturing children is a moral imperative incumbent on both parents, which cannot be disavowed. By holding up this vision of parenthood, joint custody may be able in subtle ways to reshape attitudes about responsibility for children. Its expression of what it means to be a parent becomes part of the stock of narratives by which individuals make sense of their lives and their relations with others.

If, then, we focus on law as an element in the creation of cultural

158. Bartlett & Stack, *supra* note 119, at 18.

159. *Id.* at 40.

160. *Id.* at 32.

161. *Id.*

162. "Neutrality in this context is a facade, describing how things are regardless of what better state of affairs one might imagine." *Id.*

163. *Id.* at 33.

164. *Id.* at 33-34.

meaning, we might prefer joint custody to the primary caretaker presumption even if research indicates that recent legal change appears not to affect current patterns of childrearing. The study discussed earlier, which concluded that joint custody is neither as good nor as bad as partisans contend,¹⁶⁵ underscores this point. As researchers in that study suggest, "[p]erhaps the importance of joint legal custody is that it is a legislative affirmation that fathers, as well as mothers, are responsible for their children after divorce."¹⁶⁶ The impact of joint custody therefore "may best be measured not by comparing sole and joint legal custody families of the same temporal cohort, but by comparing successive cohorts on parental behavior following divorce."¹⁶⁷ Attitudinal change often occurs slowly and gradually over time, as persons assimilate various cultural cues about appropriate behavior. Regulation premised on the assumption that law plays no part in this process may forgo the opportunity to transform, and may in fact promote, underlying patterns of behavior that sustain inequitable arrangements.¹⁶⁸

These objections to Fineman's analysis are not necessarily conclusive. Her failure to confront them, however, undermines the force of her argument and deprives us of the opportunity to engage in a richer and more complex debate about the direction of divorce law. Discussion of just a couple of lines of argument suggests the dimensions of such a debate. Fineman might respond to critics, for instance, by saying that, as long as women are not economically harmed by choosing caretaking roles, we can afford to be indifferent about the continuation of a traditional division of labor. She might even invoke what has been called "difference feminism" to argue that women's emphasis on performing the tasks of nurturance reflects a distinctive female orientation of care, which eschews a male model of identity based on economic self-interest.¹⁶⁹

This response in turn might provoke a reply that women's ten-

165. See *supra* notes 120-33 and accompanying text.

166. Albiston et al., *supra* note 128, at 177.

167. *Id.*

168. "[A]n end to the law's complicity in inequalitarian norms may be a precondition of reform and even a catalyst for it." Bartlett & Stack, *supra* note 119, at 30 (footnote omitted).

169. For various versions of this school of thought, see JEAN B. ELSHTAIN, *PUBLIC MAN, PRIVATE WOMAN* (1981); CAROL GILLIGAN, *IN A DIFFERENT VOICE* (1982); NELL NODDINGS, *CARING: A FEMININE APPROACH TO ETHICS AND MORAL EDUCATION* (1984); SARA RUD-DICK, *MATERNAL THINKING* (1989); Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 BERK. WOMEN'S L.J. 39 (1985); Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986).

Fineman elsewhere has expressed her belief that "many women experience society in ways significantly different from the ways that men experience society." Martha L. Fineman, *Challenging Law, Establishing Differences: The Future of Feminist Legal Scholarship*, 42 FLA. L. REV. 25, 37 (1990). She stresses that her approach "is based on experiential, not essential differences," which flow from "a variety of experiences — material, psychological, physical, social, and cultural." *Id.*

dency to assume primary caretaking responsibility reflects not so much the operation of a distinct set of feminine values as the influence of a system of gender domination.¹⁷⁰ The embrace of domesticity may be rational within that structure of choices, but it does not necessarily represent an outcome that women would choose were they not constrained by social pressures and a segregated job market. But if that is true, a rebuttal might ask, won't our failure to compensate women for the assumption of domestic responsibility in effect penalize women for "choices" that they did not freely make?

Another reply to Fineman's argument might be that we have reason to be concerned about the traditional division of labor even if women suffer no economic disadvantage as a result of it. Some scholars argue that female-dominated child care plays a powerful role in generating dynamics of personality development that perpetuate male domination.¹⁷¹ These analysts focus on the emotionally charged nature of the infant's pre-Oedipal interaction with her caretaker, usually the mother. The infant's condition of absolute dependence, they theorize, gives rise both to rage at the mother as well as the expectation that her needs naturally will be effaced for the sake of others. These deeply rooted sentiments then contribute to the systematic devaluation of women's experience. We have barely begun to explore the implications of these ideas for family law.¹⁷² Nonetheless, they arguably should at least give us pause before we assume that economic dependence is the only reason for concern about a division of labor by gender. In turn, a rebuttal might draw on critiques of psychoanalytic tenets and their application to gender relations and the law.¹⁷³

These are but a few of the issues that a broader conception of law forces us to confront in discussing divorce reform. They reflect awareness of the dynamic relationship among law, behavior, and culture, in which legal reforms adopted within a given social context in turn have the potential to change the contours of that context. They remind us that our actions often have unexpected and far-flung consequences that resonate both on a material and symbolic level. Ideally, we may want, as Herma Hill Kay put it, "a nonpunitive, nonsexist, and nonpaternalistic system of marriage dissolution built on sharing prin-

170. See, e.g., Williams, *supra* note 37, at 802-06.

171. See NANCY CHODOROW, *THE REPRODUCTION OF MOTHERING* (1978); DOROTHY DINNERSTEIN, *THE MERMAID AND THE MINOTAUR* (1976). Chodorow has sought to add more layers of complexity to her initial formulation; a sense of the evolution of her thought can be gained from the essays contained in NANCY J. CHODOROW, *FEMINISM AND PSYCHOANALYTIC THEORY* (1989). For a critique of *The Reproduction of Mothering* that stresses the importance of considering factors such as race and class, see ELIZABETH V. SPELMAN, *INESSENTIAL WOMAN* 80-113 (1988).

172. One attempt to do so is Barbara Stark, *Divorce Law, Feminism, and Psychoanalysis: In Dreams Begin Responsibilities*, 38 UCLA L. REV. 1483 (1991).

173. See, for example, the essays collected in the symposium on Chodorow's ideas, *On The Reproduction of Mothering: A Methodological Debate*, 6 SIGNS 482 (1981).

ciplcs.”¹⁷⁴ As the discussion in this section indicates, however, there is considerable internal tension among the elements in such a formula. Fineman’s rigid dichotomy between law as cause and law as effect, and between the symbolic and the concrete, unfortunately limit the extent to which her book provides guidance in the face of our dilemma.

Fineman also limits the value of her contribution by positing another rigid dichotomy: equality versus equity. Although she educates us about the perils of an uncritical embrace of equality, her categorical rejection of that concept neglects equality’s potential to challenge the inequity that she decries.

VI. EQUALITY AND EQUITY

Commitment to the principle of equality has been a failure in family law, Fineman argues, because it has produced inequitable results. Women and children tend to be much worse off than men as a result of divorce, primarily because of divorce rules that ignore their vulnerability for the sake of adherence to an abstract ideal of equality. As a result, we must choose between equality and equity. Because equality rhetoric is “too easily appropriated and utilized to gain support for antifeminist measures,” Fineman maintains that “it would seem time to abandon equality” (p. 190). In other words, if you want justice, don’t pursue it in the name of equality.¹⁷⁵

Fineman’s critique throughout her book, however, is not of equality rhetoric in all its forms, but of a particular instance of it: “‘rule,’ or formal, equality” (p. 3). Rule equality demands that formally neutral rules be applied to all, so that everyone is treated the same. It proceeds on the assumption that people are essentially the same, so that the burden of proof is on those who advocate different treatment. By contrast, “result-equality” (p. 3) seeks to ensure that “the effects of rules as they will be applied will place individuals in more or less equal positions” (p. 3). Result equality thus may require unequal formal treatment. Given women’s disadvantage in the market, Fineman contends, feminists should have made result equality the guiding principle of divorce reforms (p. 4). Instead, because of the desire for a symbolic assertion of the principle that men and women are basically the same, gender-neutral rule equality dominated reform efforts.

Fineman’s analysis is consistent with that of other recent feminists who have criticized rule equality as insensitive to the ways in which men and women are not similarly situated.¹⁷⁶ Furthermore, these crit-

174. Herma Hill Kay, *Beyond No-Fault: New Directions in Divorce Reform*, in *DIVORCE REFORM*, *supra* note 9, at 6, 36.

175. See p. 2 (“[I]n order to do equity we must move away from equality as the grand principle in family law reform. . .”).

176. See, e.g., ELIZABETH H. WOLGAST, *EQUALITY AND THE RIGHTS OF WOMEN* (1980); Mary E. Becker, *Prince Charming: Abstract Equality*, 1987 SUP. CT. REV. 201; Lucinda M.

ics argue, the determination of whether persons are the same often implicitly uses a male standard as its conception of the individual. Lucinda Finley, for instance, has observed that the law has required employers to make numerous accommodations for employees to participate in military service, the vast majority of whom are male. Only a very small percentage of employees receive these benefits, but the accommodations tend not to be seen as "special" provisions for workers who are "different" from others.¹⁷⁷ By contrast, an argument for pregnancy leave tends to be cast as a request for "special" treatment because women are "different" from other workers. The explanation in each instance is the implicit use of a model based on male experience.¹⁷⁸

Fineman thus draws on a cogent critical perspective in her contention that rule equality may have diminishing returns as a vehicle for gender justice. More problematic, however, is her move from this proposition to the categorical rejection of equality as a source of inspiration because of its association with rule equality. This seems unnecessarily sweeping. To be sure, there may be a tendency in American culture to associate equality in general with rule equality in particular. Fineman observes that equality has a distinct legal history, which creates the danger that reforms pursued under its banner will be "confused and confounded by the legalistic meaning and content of the term" (p. 35). The passage of the Equal Protection Clause, for instance, after a period of formal legal discrimination, and the construction of that Clause to encompass formal but not substantive equality,¹⁷⁹ surely contributes to a perception that equality means rule equality. Fineman's mindfulness of this powerful pull toward a particular conception of equality therefore seems sensible.

Fineman's conclusion that this warrants rejecting any appeals at all to equality seems premature, however. First, it neglects recent feminist scholarship that has attempted to reformulate a conception of equality that rests not on the demonstration that men and women are the "same," but on the accommodation of difference.¹⁸⁰ Christine Lit-

Finley, *Transcending Equality Theory: A Way Out of the Maternity and Workplace Debate*, 86 COLUM. L. REV. 1118 (1986); Ann C. Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373 (1986).

177. See Finley, *supra* note 176, at 1176.

178. See MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 75 (1990) ("The assumptions that differences lie *within* people obscures the fact that they represent comparisons drawn *between* people, comparisons that use some traits as the norm and confirm some people's perceptions as the truth while devaluing or disregarding the perspectives of others.").

179. See, e.g., *Washington v. Davis*, 426 U.S. 229 (1976) (rejecting challenge under equal protection component of Due Process Clause to hiring test that blacks failed four times as often as whites); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (rejecting equal protection challenge to school financing scheme that resulted in disparities in funds available for public school districts).

180. This difference may be socially constructed or biological.

tleton, for instance, has acknowledged that formal legal equality is of minimal use when we encounter "real" difference, that it often is available only if a woman's experience can be analogized to a man's, that it treats "difference" as located "within" women, and that it assumes gender-neutral institutions with respect to which men and women are similarly situated.¹⁸¹ Littleton, nonetheless argued that the wholesale rejection of equality in favor of concepts such as justice or "special rights based on special needs" neglects the powerful potential of equality rhetoric.¹⁸² Equality serves to express a "consistent theme of belonging, of somehow 'counting' as human,"¹⁸³ and is capable of articulating "a commonality among human beings."¹⁸⁴ As a result, while equality is now enmeshed in a system of gender, "it is capable of having meaning beyond that system."¹⁸⁵

Littleton offers a reformulation of equality in terms of "equality as acceptance."¹⁸⁶ This principle asserts that "[t]he difference between human beings, whether perceived or real, and whether biologically or socially based, should not be permitted to make a difference in the lived-out equality of those persons."¹⁸⁷ The focus is not on whether men and women are the same or different, but on the ways in which any asserted differences are used to create and justify disadvantage. A society animated by equality as acceptance will strive to make gender differences "costless relative to each other,"¹⁸⁸ so that those pursuing either a "feminine" or "masculine" way of life will obtain "equal resources, status, and access to social decisionmaking."¹⁸⁹ Thus, for example, those who choose to concentrate on "socially female occupations" such as childrearing should receive benefits comparable to those who opt for "socially male occupations" such as law or business.¹⁹⁰

181. Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279, 1306-08 (1987).

182. *Id.* at 1310.

183. *Id.* at 1284 (footnote omitted).

184. *Id.* at 1284 n.29. Littleton also suggests that equality analysis has the practical benefit of offering "one of the few avenues by which concrete experiences of subordination can be translated into legal claims." *Id.* at 1284.

185. *Id.* at 1283.

186. *Id.* at 1285.

187. *Id.* at 1284-85 (emphasis omitted).

188. *Id.* at 1297.

189. *Id.*

190. *Id.* at 1301. Although she proceeds from a somewhat different perspective, Mary Becker offers some examples of how compensation might be provided so as to assure comparable benefits for childrearing. Mothers could be given preferences in employment such as those given veterans in many states: "Large employers could give mothers extended leaves while their children are young, just as they gave male inductees extended leaves for military service during the operation of the draft"; and childrearing "could be given social security credits in their own accounts" rather than be entitled only to claims as their husbands' dependents. Becker, *supra* note 176, at 208-09.

According to Littleton, equality as acceptance preserves the value of equality rhetoric while responding to feminist critiques of formal equality. It is able to account for the existence of "difference," focusing not on whether difference is an intrinsic trait but on what cultural significance is ascribed to it. Furthermore, it recognizes that institutions are not necessarily gender neutral, so that women can be disadvantaged by the application of facially neutral rules.¹⁹¹ Gender privilege "depends on equality meaning sameness,"¹⁹² but equality as acceptance acknowledges difference and emphasizes "how to achieve equality despite it."¹⁹³

Other feminists have offered similar alternative conceptions of equality. Deborah Rhode stresses the limits of defining equality as the requirement of "similar treatment for those similarly situated,"¹⁹⁴ arguing that the law should focus not on gender difference but gender disadvantage. Framed in this way, the issue is the extent to which "sex-linked traits and values"¹⁹⁵ serve to justify disparities in "status, power, and economic security."¹⁹⁶ In pursuing a "substantive commitment to gender equality,"¹⁹⁷ Rhode urges, "we need not simply mandates of equal treatment for women; we need strategies to secure women's treatment as equals."¹⁹⁸ Similarly, Joan Williams suggests that the problems with "sameness arguments" can be surmounted "if we stress not sameness but equal dignity."¹⁹⁹ Assessments of sameness should be seen not as statements about the inherent qualities of individuals, since we all differ in some way. Rather, they should be regarded as judgments that whatever differences exist in a particular context should not be deemed relevant to the issue at hand.²⁰⁰ This approach "links equality with questions of policy rather than biology."²⁰¹

These versions of equality point up the way in which equality serves as a powerful implicit basis for judgments about the equity of social arrangements. A concern that the needs of some people are being slighted, or that they receive fewer social goods than others, rests upon the notion that each person is of equal worth. That women are

191. Littleton, *supra* note 181, at 1312-13.

192. *Id.* at 1322.

193. *Id.* at 1313.

194. RHODE, *supra* note 62, at 3.

195. *Id.* at 313.

196. *Id.* at 317.

197. *Id.* at 4.

198. *Id.* at 319.

199. Joan C. Williams, *Dissolving the Sameness/Difference Debate: A Post-Modern Path Beyond Essentialism in Feminist and Critical Race Theory*, 1991 DUKE L.J. 296, 308.

200. *Id.*; see also Joan W. Scott, *Deconstructing Equality-Versus-Difference: Or, the Uses of Poststructuralist Theory for Feminism*, 14 FEMINIST STUD. 33 (1988).

201. Williams, *supra* note 199, at 308 (footnote omitted).

often financially worse off than men after divorce matters to us if we believe that the lives of men and women are of equal value, and may not if we do not. Put differently, equality directs attention to the question of distributive justice: if people are equally entitled to well-being, then they are equally entitled to "the means of well-being."²⁰² The historical function of equality has been to challenge indifference to distributive issues based on the greater valuation of some lives over others. "We could say that respect is due to humanity as such," Jeremy Waldron has observed.²⁰³ "But 'equality' has the extra and important resonance of indicating the sort of heritage we are struggling against."²⁰⁴

One heritage against which we are still struggling is a gender system that has disproportionately rewarded traditionally male pursuits and devalued caretaking activities.²⁰⁵ In the face of this history, a concept such as equality of acceptance can serve to "affirm the equal validity of men's and women's lives."²⁰⁶ Employed in this way, the principle of equality can be used to challenge the propriety of facially neutral rules, as those rules may not allocate goods in a way that assures men and women comparable well-being in their chosen ways of life.²⁰⁷

The rhetoric of equality may also be important for another reason. Fineman argues that modern family law tends to "cast [women] as unencumbered, equally-empowered market actors" (p. 175), that the typical model of mental health accepted by the helping professions is based on "self-contained individualism" (p. 186), and that "market ideology" has gained influence in family law (p. 25). Although Fineman does not develop her analysis in precisely the same way, these comments echo those of other observers who see market logic as increasingly influential in modern life.²⁰⁸

202. Gregory Vlastos, *Justice and Equality*, in THEORIES OF RIGHTS 41, 64 (Jeremy Waldron ed., 1984).

203. Jeremy Waldron, *The Substance of Equality*, 89 MICH. L. REV. 1350, 1363 (1991) (book review).

204. *Id.*

205. Carol Gilligan's work, for example, has been shaped by the sense that traditional moral development theory has regarded as "normal" those experiences that are more typically male than female in this culture. GILLIGAN, *supra* note 169, at 5-23. Gilligan's research has been a reaction to the work of theorists such as Lawrence Kohlberg. See LAWRENCE KOHLBERG, THE PHILOSOPHY OF MORAL DEVELOPMENT (1981).

206. Littleton, *supra* note 181, at 1313.

207. As I have noted, Fineman acknowledges this potential in what she describes as "result equality." See pp. 3-4.

208. "The traditional liberal view, asserting that there must be a realm of personal interactions walled off from the market, is striving to hold some territory against the oncoming forces of economics and the notion that everything is grist for the market mill." Margaret J. Radin, *Justice and the Market Domain*, in MARKETS AND JUSTICE 165, 166 (John W. Chapman & J. Roland Pennock eds., 1989); see also BARRY SCHWARTZ, THE BATTLE FOR HUMAN NATURE (1986); ALAN WOLFE, WHOSE KEEPER? SOCIAL SCIENCE AND MORAL OBLIGATION 27-104 (1989). The influence of market logic is reflected, for instance, in claims that economic analysis

The "market" is of course a reification, but one of its functions in American discourse has been to denote a realm of self-interested behavior in contrast to the ostensibly more altruistic realm of the family.²⁰⁹ Although the family has been regarded as the institution that responds to the inequality embodied in need and dependence, the market typically has been more tolerant of such disparities. Although this tolerance has rested in part on utilitarian judgments of efficiency, it has also drawn upon notions of individual autonomy and desert.²¹⁰ The relevant market actor is the abstract self-interested individual who tries to maximize personal welfare through the exercise of rational choice.²¹¹ From this atomistic perspective, unequal outcomes in a competitive market reflect returns to different amounts of skill or effort. On this view, the market is a true meritocracy: by forcing individuals to take responsibility for the consequences of their actions, it encourages the cultivation of rational behavior.

Concern about the influence of market logic within the family thus expresses the fear that principles such as self-interest and self-reliance may become more prominent within family life. To the extent that a market orientation "starts from a postulate of an essentially unsocial nature of man," it leaves us "without any ethical principle that could override the economic behaviour logically required of unsocial man, i.e., pure individual maximizing behaviour."²¹² One reflection of this might be a greater tendency to treat financial disparities at divorce as simply the natural result of different individual choices by men and women about levels of career investment. Cast in this light, these disparities may seem less worthy of our attention, because redressing them would subsidize misguided investment decisions.²¹³ Further-

provides an overarching framework for analyzing diverse areas of human experience. See Reuven Brenner, *Economics — An Imperialist Science?*, 9 J. LEGAL STUD. 179 (1980); Jack Hirshleifer, *The Expanding Domain of Economics*, 75 AM. ECON. REV. 53 (1985).

209. "The morality of altruism has been supposed to animate the family to the same extent that the morality of individualism has been supposed to pervade the marketplace." Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1505 (1983); see also Judith Areen, *Baby M Reconsidered*, 76 GEO. L.J. 1741, 1742 (1988) (stating that in the market, self-interested behavior is "not only acceptable," but "is assumed to benefit society"; in the family, by contrast, "relationships are premised on caring as much as on self-gratification").

210. See MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* (1962).

211. According to Alan Wolfe, the market is "an abstract process of calculating the economic gains and losses associated with individual decision-making." WOLFE, *supra* note 208, at 28.

212. C.B. MACPHERSON, *The Rise and Fall of Economic Justice*, in *THE RISE AND FALL OF ECONOMIC JUSTICE AND OTHER PAPERS* 1, 3 (1985). For an argument that an inherent justificatory principle of capitalism is in fact responsiveness to need, see Jonathan Riley, *Justice Under Capitalism*, in *MARKETS AND JUSTICE*, *supra* note 208, at 122.

213. This of course is not the only conclusion that market logic might dictate. Those who accept the behavioral assumptions of economic analysis might see spousal self-interest as served by cooperative behavior within marriage. This is the point made by those economists who argue that we need to compensate marriage-specific investments that yield greater benefits for spouses

more, a wealthy husband divorcing a less wealthy wife may have difficulty accepting the idea that he has a responsibility to provide assistance to someone who has not "earned" that assistance by providing enough benefits to warrant staying in the marriage. It seems reasonable to infer that Fineman believes that it is precisely this type of market individualism that has exacerbated gender inequity at divorce.

Equality rhetoric, however, traditionally has served to limit the reach of market principles. It has asserted that some outcomes are simply unacceptable, regardless of how efficient they might be or how much they might undermine a market meritocracy. As Gregory Vlastos has pointed out, the concept of merit focuses on particular attributes as the basis for ranking individuals.²¹⁴ By contrast, equality asserts that "the human worth of all persons is equal, however unequal may be their merit."²¹⁵ If someone is valued on the basis of merit alone, Vlastos has argued, that person "is not being valued as an individual."²¹⁶ Thus, an ex-spouse may be regarded as nonmeritorious according to market logic because of her irrational investment behavior. Equality rhetoric offers an alternative reason for responding to her financial condition, however. Consequently, if we inhabit an era in which the influence of market logic has increased, it seems especially important to preserve a rhetoric that has enabled us to present a forceful challenge to that logic. Equality rhetoric has a deep resonance in Western culture, especially in the United States, and we should be wary of wholesale rejection of it as a language for framing claims for social justice.

CONCLUSION

I have discussed various ways in which insistence on a purity of vision undermines the contributions of *The Illusion of Equality*. Fineman's determination to expose the inadequacies of equality theory in family law leads her to eschew the qualifications or concessions that would characterize a more inclusive perspective. It prompts her to

than would result from purely individually oriented behavior. See *supra* notes 142-45 and accompanying text.

This argument is still premised on the primacy of self-interested behavior and on the assumption that economic incentives are necessary in order to elicit altruistic behavior. Some have suggested, however, that this model does not do justice to the sacrifice and altruism that does and should characterize family life. See, e.g., Schneider, *supra* note 102, at 242 (stating that insistence on recompense of economically rational spousal sacrifice "may undercut the sense that spouses ought to have of obligation to the family and each other and of love for each other which may itself be a sufficient basis for sacrifice"). By casting altruism as a form of self-interested behavior, and by justifying concern for inequality in terms of preserving incentives for individually rational behavior, market logic may reinforce an individualistic ethic and an orientation traditionally more tolerant of unequal outcomes.

214. Vlastos, *supra* note 202, at 52.

215. *Id.* at 51.

216. *Id.* at 52.

offer unrelenting criticism of liberal feminists and to pose our choices in terms of stark dichotomies.

The most useful way to think of this book, then, is as a polemic, with both the virtues and defects of that form. As Thomas Grey reminds us, the value of a single-minded critique is that it "turns a more intense light on certain aspects of experience than will ever be provided by more tolerant and catholic thinkers."²¹⁷ Fineman renders service in demanding that we confront the gendered character of family life and in warning us against the reflexive application of comfortable legal concepts to family relationships. She forces us, in other words, to rethink the familiar.

Ultimately, however, divorce law must contend with more complexity than Fineman is willing to acknowledge. We are both cause and effect of the gender system, which means that we may unwittingly reproduce it even as we seek its demise. Family law may well be a small part of any effort to respond to injustice between men and women. Nonetheless, if it is to play even a minor role, we will need a coherent theory of postdivorce obligation, a better grasp of how law guides individual choices, more insight into how law shapes the ways in which we orient ourselves as men and women, and a deeper understanding of the promise and peril of various versions of equality. In short, we will need to find ways to move beyond the legacy of gender even as we remain within its grip.

217. THOMAS C. GREY, *THE WALLACE STEVENS CASE: LAW AND THE PRACTICE OF POETRY* 74 (1991).

MEDIEVAL ICELAND AND MODERN LEGAL SCHOLARSHIP

*Richard A. Posner**

BLOODTAKING AND PEACEMAKING: FEUD, LAW, AND SOCIETY IN SAGA ICELAND. By *William Ian Miller*. Chicago: University of Chicago Press. 1990. Pp. xii, 407. \$29.95.

I

Professor William Miller of the University of Michigan Law School has written a learned and lively book on the society of medieval Iceland, with special reference to its methods of dispute resolution. He has written the book for two audiences. One consists of the tiny handful of specialists in medieval Iceland; the other of social historians, academic lawyers, political scientists, and other social scientists interested in dispute resolution and in social control more generally (including the foundations of the state). For the second group, the relative simplicity — political, social, and religious — of medieval Icelandic society lends fascination to the social institutions found in it because they are, as it were, observed under laboratory conditions.

I am a member of Professor Miller's second audience, and so will not try to evaluate the accuracy of his scholarship. I have no reason to question it. I read the two books of Icelandic scholarship listed in Miller's bibliography that seemed most like his book,¹ and a comparison of those two books with Miller's does not suggest, at least to this outsider, that Miller's scholarship is in any way deficient. His book is longer and more detailed than either of the others and contains as impressive a bibliography.

Miller's concern is with the period (A.D. 930-1262) in which medieval Iceland was independent. It is this period — between the settlement of Iceland (primarily by Norwegians) and the submission of the country to the King of Norway — that is depicted in the sagas, which are our main source of knowledge of medieval Iceland although there

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1. JESSE L. BYOCK, *FEUD IN THE ICELANDIC SAGA* (1982); JESSE L. BYOCK, *MEDIEVAL ICELAND: SOCIETY, SAGAS, AND POWER* (1988) [hereinafter BYOCK, *MEDIEVAL ICELAND*]. Byock, a historian, specializes in and has published a number of articles on medieval Iceland, besides the two books. A recent addition to the pertinent literature is Henry Ordower, *Exploring the Literary Function of Law and Litigation in Njal's Saga*, 3 *CARDOZO STUD. L. & LIT.* 41 (1991).

are also law codes and other miscellaneous writings and some archaeological remains. Those of us who remember the television series *Monty Python's Flying Circus* recall saga Iceland as a bleak, featureless, monotonous land of drably accoutered and colorless people whose names are strange without being charming — recall it indeed as the quintessence of the dull. Professor Miller has succeeded in dispelling this impression by the liveliness of his style and the infectiousness of his own enthusiasm for his subject. That success is a tour de force in itself, for apart from, but of course not unrelated to, the unforgiving land and, as a consequence, sparse population, medieval Iceland lacked everything that made the Middle Ages so colorful a period in Western history. Iceland had no king, court, or nobility; feudalism was at best nascent, which is not to say that the society was egalitarian, for some men were considerably more powerful than others and some indeed were little better than slaves — some *were* slaves.² The Catholic Church was much weaker than in Europe — so weak that for much of the period of independence it was forced to adopt a policy of peaceful coexistence with paganism.³ There were no Jews or heretics. Art, architecture, music, ornament, and decor were nonexistent or rudimentary. There were no wars, no armies, no jousts, no chivalry, no courtly love, no philosophy or theology, no theater, and no literature other than the rather matter-of-fact sagas.⁴ There were no cities, no towns or even villages. There were no stone buildings. It was a simple pastoral culture.

But of course it is the very simplicity of saga Iceland, a simplicity almost (though not quite, as we shall see) unique in Western history, that is the fascination — in particular its political simplicity. It was not quite a stateless society; nor is a stateless society apolitical; but the Icelandic state was weaker than the weakest night-watchman state. The formal institutions of government consisted of courts and an assembly, which, like the ancient Athenian courts and assembly, were staffed by ordinary citizens rather than by professionals. There were no professionals, though there were law experts who in retrospect can be seen as proto-professional; in effect there were jurors but no judges

2. And this at a time when slavery had all but disappeared from Europe.

3. An unfortunate omission in Miller's book is that the nature of Icelandic paganism is nowhere explained; the index entry for "religion" merely refers the reader to the entry for "Church." The omission is repaired in BYOCK, *MEDIEVAL ICELAND*, *supra* note 1, at 137-64.

4. Professor Miller's translations make them downright prosaic, probably unfairly to the sagas' authors because I am informed on good authority that the prose style of the sagas — in their original Icelandic, of course — is elegant, and modern in its precision and brevity. Miller might reply that he is trying to be accurate rather than artistic. Yet when he has a saga character say, "To tell the truth, I could care less if they do each other as much harm as they wish" (p. 259), he makes it hard for the reader to believe that one is dealing with the peers of Homer. (The Penguin translation is a little better: "To tell you the truth, they can do one another as much harm as they please for all I care." LAXDÆLA SAGA 173 (Magnús Magnússon & Hermann Pálsson trans., 1969)). Although Miller praises the sagas for their subtlety of characterization, it cannot be said that he inspires a desire to read them.

(hence no appeals). The speaker of the assembly was the only salaried official in Iceland. There was plenty of death, including much chopping off of heads with axes, but at least there were no taxes (or virtually none: the speaker was paid out of the marriage fee). There was, crucially, no executive arm of government and as a result there were no sheriffs, no police, no soldiers, and no prosecutors. All suits, including criminal suits, were prosecuted by private individuals, and, what was the greater innovation in the art of minimizing government (for a number of societies that no one would call stateless have left prosecution even of criminal cases to private individuals⁵), all judicial decrees were enforced privately, if at all.

Adjudication was not the only lawful method of resolving disputes. The feud was lawful, too, and so (less surprisingly) was private arbitration, in which a dispute was submitted for binding resolution to one or more men selected by the disputants. Family was extremely important. Because people looked to both near and remote relatives for aid in enforcing decrees and conducting feuds, concepts of kinship were more elaborate and refined than in modern society. Power was important too. Powerful men were chieftains, to whom lesser men rendered services in exchange for support and protection. Here was the germ of a feudal system; but the elaboration of feudal duties, ranks, and obligations that we find in medieval Europe was missing. Moreover, chieftainships could be sold — an intrusion of the market that a true feudalist would consider horrifying.

Icelanders were great amateur lawyers and their law codes were as complex and ingenious as most of the rest of their culture was simple and monotonous. Njal, the hero of the best-known saga, was one of these amateur lawyers. The procedures for finding facts were more rational than those in force in most medieval societies, for little reliance was placed on supernatural methods. Yet the system was surprisingly inflexible on the remedial side. The only sanctions that the Icelandic courts meted out, other than for the most trivial infractions (which were punished by a fixed fine), were outlawry and lesser outlawry. Outlawry made a man an outlaw in the literal sense: anyone could kill him with impunity. Lesser outlawry meant banishment from Iceland for three years. The inflexible character of the legal remedies made arbitration attractive, since arbitrators could impose fines or fashion what we would call equitable decrees, tailored to the particular circumstances of the case. Refusal to obey an arbitral decree was punishable like other serious wrongdoing.

This strikingly decentralized system of governance survived for more than three centuries. No one knows just how much violence there was, but the society was not anarchic, though the institutional structure sketched above might seem a recipe for anarchy. Nor did

5. See, e.g., DOUGLAS M. MACDOWELL, *THE LAW IN CLASSICAL ATHENS* 237-40 (1978).

saga Iceland lapse into tyranny, despite the apparent fragility of its institutions. Even feuds were governed by norms (for example, that the killing of an outlaw should not be revenged — should not, that is, occasion a feud) that despite the absence of formal sanctions were obeyed with some, though far from complete, regularity.

All this — the system of law and order in medieval Iceland and its ancillary institutions such as kinship — Professor Miller sets forth with admirable clarity and also with a wealth of detail, meanwhile judiciously separating fact from fiction in the saga accounts and lucidly recounting from the sagas numerous disputes and their resolution by feud, litigation, or arbitration. The greatest strength of the book is its description of the structure and, above all, the actual operation of medieval Icelandic institutions. Although Miller's focus is on dispute resolution, much of the book quite properly is devoted to describing the social background out of which disputes arose and against which they were resolved, including the system for the exchange or transfer of goods (through gift exchange, sale, or raid), the subject of a superb chapter (Chapter Three). The second audience of which I spoke at the outset can hardly be assumed to be conversant with the structure of Icelandic kinship, yet that structure is basic to an understanding of the operation of the feud, the lawsuit, and arbitration, and so receives a chapter too (Chapter Five). It is basic because none of the methods of dispute resolution could be implemented effectively without rallying potential supporters, and the principles of kinship were vital in determining who your potential supporters were and also whom among your potential opponents you might neutralize on grounds of kinship (pp. 164-67).

Miller's former vocation as a professor of literature stands him in good stead as he teases out the implications of the saga texts that are the principal data for his analysis, while his present vocation as a law professor may account for the superior crispness and authority of his description of the Icelandic legal process (Chapter Seven), compared to Byock's.⁶ The only fault I have to find at the level of description, of narrative, as distinct from the level of analysis, is with the clumsiness of Professor Miller's scholarly apparatus; and it is with this point, parochial or even pedantic as it might appear to be, that I begin my critique.

II

Miller has, as I have said, two audiences. His method of trying to satisfy the demands of the first, the specialist audience, for documentation without losing the rest of us to tedium is inept. It consists of combining the "scientific" method of citing references — that is, citing

6. See sources cited in note 1, *supra*.

them in the text itself (or in the endnotes) by the author's last name and the date of publication and giving the full citation information in a bibliography at the end of the book — with long textual endnotes (sixty-three pages of small print, compared to a text of 308 pages). So there are really three texts: the text itself, studded with bibliographical references and endnote call numbers; the bibliography; and the endnotes. Opening the book at random, I find myself on page 224, where in the middle paragraph I spot endnote call number nine. I go to the back of the book and flip through the notes until I find note nine to page 224, and there I find a reference to page 144, to which I repair only to find another endnote call number, which sends me to a note that contains bibliographical references in scientific form and therefore propels me to the bibliography. Who can read a book this way? Maybe medieval Icelandic studies is such a quiet field that an Icelandic scholar would be refreshed to encounter a book in his field composed *à la mode* Derrida, but it turns out that many of the endnotes and many of the bibliographical references in both the (main) text and the endnotes are directed at the second audience, the general scholarly audience. The last two endnotes in the book are to game theory and to the comparative study of revenge, respectively, rather than to anything Icelandic. They contain three citations and so send one hopping to the bibliography again.

The scientific system of citation is designed for short papers with a handful of references; you can remember the names as you read, and when you get to the end you can see at a glance what works the author is building from and make a note of any work you want to look up. The system makes no sense for a long book with a bibliography of (at a rough count) almost four hundred separate works.

My bigger gripe is the endnotes. I have not yet read a book in which I thought it made sense to put the notes at the end of the book rather than at the bottom of the pages. It is too great an interruption to be constantly turning to the back of the book. How much of an interruption depends on the number and length of the notes. Miller's book has more than four hundred notes, which means an average of more than one per page of text or, more vividly, means that the conscientious reader will be turning to the back of the book four hundred times before he has finished. Once back there, as I said, he will often find himself flipping still farther back to the bibliography before he returns to the main text. The notes aren't short either, for remember that most of the bibliographical information is in the bibliography rather than in the initial citation; thus these are mainly textual notes. Four hundred notes in sixty-three pages means that each page of notes — pages in small print, be it noted — has on average fewer than seven notes, and that means that the average note is substantial. Some of them are a page or more in length, and by the time you've finished

reading one of these notes and returned to the text you've lost the thread of what you were reading.

I can imagine, though I don't recall ever having actually seen, a book in which all the endnotes were (1) bibliographical and (2) intended solely to provide research leads for specialists. And in such a book the endnote format wouldn't be troublesome. Miller's book is not of that character. The notes are a melange of bibliographical and textual, and many of the bibliographical notes supply not merely leads for further research but the sources and evidence for the cruces in Miller's argument. The careful reader, specialist or not, wants to see those notes as he reads.

I have gone on at such length on this subject — at the risk of sounding like one of those cranky reviewers who complain about the size of typeface or the quality of the binding or the color of the dust jacket, or who count typographical errors — because the endnote is a rapidly growing plague of scholarly book publishing rather than just an idiosyncratic failing of Professor Miller and his publisher. He has made it even worse by combining it with the scientific method of citation (ironically, since, as we shall see, Miller is no friend of the application of scientific method to the study of human society) and by the number, length, and heterogeneous character of the notes.

Miller might reply that his notes and bibliography contain much useful information — which is true — and what was he to do with it? As footnotes with full bibliographical information, the notes would have taken up on average almost twenty percent of each page of the book. But it's a lot easier for the reader to glance to the bottom of the page and see whether a note is something he wants to read than to turn to the back of the book. And anyway the notes could and should have been pruned. Some of them are unnecessary; for example, the reader need hardly be told that the name of a saga character that Miller translates as "Sam" is not derived from the Hebrew "Samuel" (p. 353 n.27), especially since Samuel is not "Samuel" in Hebrew, it's *Shmuel*. No one thinks the Icelanders are the lost tribe of Israel. Some notes continue the discussion in text and could have been integrated into it. Some deal with recurrent issues relating to the texts of the Icelandic sagas and could have been consolidated and addressed in the introduction.

It is easy when writing a scholarly piece to keep adding notes as new thoughts occur to one or as new sources come to one's attention. But at the end one should go back and interrogate every note carefully, asking: Is this a qualification or continuation or amplification of the text, and if so can it be worked into the text so that the flow of discussion is not broken? Is it a minor point that can be dropped without impairing the integrity of the work? Can it be consolidated with another note? Had Professor Miller undertaken such a regimen, and,

having drastically reduced the number and length of his notes, placed the survivors at the bottom of the pages where they belong, he would have produced an even more readable work than he has.

III

A more serious problem with *Bloodtaking and Peacemaking* is the book's relation to theory. The book is at once too theoretical and not theoretical enough. It is too theoretical in that it gestures toward two largely useless (for Miller's proper purposes) bodies of theory that happen to overlap. The result is some bad patches of jargon, some laboring of the obvious, and some superfluous bows to the norm of political correctness for which his university is notorious.⁷ One of the bodies of theory is the historical and, particularly, the anthropological literature on dispute resolution, and it is indeed a mine of interesting information about societies that resemble medieval Iceland in the weakness of their state institutions and resulting emphasis on substitute institutions such as the feud and arbitration; but the literature in question is for the most part a- or pretheoretical, occasionally venturing interesting generalizations but usually emphasizing the uniqueness of the particular society under consideration. (Anthropologists, like historians, have a vested interest in the particularity of the individual culture that they have taken such pains to understand.) General knowledge is not the only knowledge, even if you don't agree with William Blake's dictum that to generalize is to be an idiot. But knowledge without an organizing theory is difficult to deploy, and Miller seems stumped by what to do with the anthropological and historical parallels that he has found.

The second body of theory that Miller invokes, albeit sparingly, is the discourse of "postmodernism" in its aspect of critique of the Enlightenment — and hence of functionalism, economics, and other scientific or at least systematic approaches to the understanding of society. Postmodernism derides objectivity, observer independence, the mutual intelligibility or intertranslatability of different cultures, the transparency of thought to language, the idea of progress, and other alleged presuppositions of Western thought. The world is a text, to be interpreted rather than deciphered, "interpretation" being understood as (at best) the forcible imposition of meaning by individuals trapped in their subjectivity, their ethnocentrism. Abstraction kills. Our only hope of understanding is through the making of ever "thicker" descriptions. Postmodernism maintains an unbroken vigil for signs of racism, sexism, and ethnocentrism, particularly when the

7. See, e.g., *Doe v. University of Mich.*, 721 F. Supp. 852, 863 (E.D. Mich. 1989) (invalidating, because too broad and too vague, the University of Michigan's regulation of hate speech and other forms of discriminatory harassment).

oppressor race is white, the oppressor sex male, the oppressor ethnos Western.

I am being pretty derisive myself, and in my soberer moods I acknowledge that we have something to learn from postmodernism (and of course from history and anthropology — two fields, by the way, deeply invaded by postmodernism), that there is, in short, knowledge besides scientific knowledge. But it isn't easy to maintain this judicious approach in the face of Miller's employment of postmodernism. All he seems to have gotten out of it is an unpleasant and unhelpful, though happily very intermittent, jargon; a desire to dress common sense in the language of theory, in other words to mystify common sense; a conviction that the world is a very complicated and mysterious place resistant to comparative study aimed at uncovering regularities and constants analogous to those found by science in nature; and a fear of being thought judgmental.

Such phrases or propositions in Miller's book as "the negotiability of significations" (p. 3), "[t]he philology of residence" (p. 115), "[f]ostering was the social construct within which the circulation of children was comprehended" (p. 123), kinship was "an organizing metaphor" (p. 154), "[t]he balanced-exchange model, to give it a name, served as a kind of constitutive metaphor" (p. 184), "[p]ower is a difficult concept, at least since Foucault made it one" (p. 245), "power did indeed have a strong discursive component" (p. 246), and "[c]an the 'private' as an analytic category exist unless it is paired with and distinguished from 'public?'" (p. 305) show how the post-modernist style can lead an author away from clear-headed analysis of social institutions and into a terminological miasma.

In the last quotation Professor Miller is trying to save his Icelanders from the clutches of the libertarians, who admire the privatization of law enforcement and find it exemplified in the society depicted in the sagas.⁸ However, the idea that "private" is not a meaningful term in a society without a "public" sector is, unless amplified, nonsense parading as paradox. The libertarian point is after all a simple though potentially misleading one: that the history of Iceland shows that a society can maintain some minimum of law and order without having what we would consider the minimum condition for law and order — a governmental monopoly of force. Medieval Iceland had barely any government, and what government it did have had no monopoly of force. The point is not touched by Miller's rhetorical question. Maybe what he means, however, is that if there is no coercive government in a society, there will be other coercive institutions to take its place, and these — a numbing traditionalism, perhaps, or intimidation by grandees — may curtail liberty just as much as does a

8. Actually, one libertarian. See David Friedman, *Private Creation and Enforcement of Law: A Historical Case*, 8 J. LEGAL STUD. 399 (1979).

modern social-welfare state, the libertarian's *bête noire*. That would be a valid and important point. If it's Miller's point, I wish he'd say so.

An earlier entry in my litany of quotations illustrates, once its context is restored, Miller's tendency to wrap a simple and correct, sometimes even an obvious, point in postmodernist cotton: "Because power was so intimately linked with reputation and specifically with the reputation for having power (that is, power did indeed have a strong discursive component), its loss was often gradual, requiring both a slow cumulation of discomfitures and a consequent community reassessment of one's standing relative to others" (p. 246). This is an obscure and plethoric way of saying that political power, being *latent* force, will often persist after the actual willingness or ability to apply force has ceased, because it will take time for knowledge of that cessation to filter out. The United States could continue to exert power over other countries for quite a time after its officials secretly agreed never again to employ force in aid of foreign policy.

Readers of this review who are familiar with my writings in the economics of law may think my criticism of Miller's jargon is a case of the pot calling the kettle black. I admit that economics has a jargon, that the jargon is overused (I hope not by me), and that it is excessively mathematized (surely not by me, for I lack the capacity to indulge in that particular vice). There is a difference. The distinctive language of economics consists of defined terms, such as *quasi-rents* and *marginal cost* and *marginal utility* and *Pareto superiority* and *comparative advantage* and *consumer surplus* and *elasticity of demand with respect to income*, and the definitions are precise. The distinctive language of postmodernism does not consist of defined terms, is evocative rather than precise, imparts no economy of expression, and if on occasion it has a certain quasi-poetic charm — the sort of thing that initiates find in Heidegger — Miller's book is not one of those occasions.

Some of Miller's points may not be worth making at all, as distinct from being made clearly. For example, he tells us that "[l]aw never eschews violence either in early Iceland or in modern industrial society" (p. 232). That is true, because it is always possible that force may have to be used to compel obedience to a legal judgment, and physical force exerted against a resisting organism *is* violence. It does not follow, however, as Miller appears to believe, that in a comparison of early Iceland to modern us, there really isn't that much to choose between on the score of law and order. In his conclusion, worrying the question whether Iceland was a more or a less violent society than ours is, Miller returns to the role of force in a modern legal system and asks whether saga Iceland merely *seems* violent in comparison to our society because of

the fear and anxiety we imagine we would feel at the prospect of having no state to enforce our rights for us or to protect us from those bent on

enforcing their own? In other words, does their culture seem more violent because the responsibility for actually doing acts of violence was more evenly distributed than it is now, there being no state agents to delegate the dirty work to or to claim a monopoly on the dirty work? [p. 304]

These questions suggest that a bloodfeud society merely makes transparent the conditions of our own society. In the same vein Miller says elsewhere that "there was no state apparatus to disguise better the relationship between the power of the parties and control of legal process" (p. 256), that "[t]he sagas do not show people *continually* living with the anticipation of violence, rape, or expropriation that many American urban dwellers must live with daily" (p. 304), and that "[e]arly state formation, I would guess, surely tended to involve redistributions, not from rich to poor, however, but from poor to rich, from weak to strong" (p. 306). The qualifications ("early," "I would guess") should be noted, but the flavor of his discussion is that the modern state, including the modern states of the West — including the United States — may not be much of an improvement on an Iceland-style bloodfeud culture (with slavery) other than in the disguise and the mystification of power the more effectively to exploit the powerless.

Miller's own account of Icelandic society belies this attack upon the idea of progress. A lot of bystanders (granted, not all are innocent) get killed in these feuds; a lot of pawns get sacrificed. "Gunnar and Njal are substantial householders; they are neighbors and good friends. Their wives, however, have been bitter enemies ever since a quarrel over seating arrangements at a feast. Insults were exchanged there and over the course of the next few years so were killings of slaves and servants" (p. 284). When Gunnar and Njal are off together, Gunnar's wife takes the opportunity to send a member of her household to kill a servant of Njal's household. Miller then describes how, to preserve their friendship, Njal accepted a cash settlement from Gunnar. "The darker side of Gunnar and Njal's settlement is that it was little more than a symbol of peace, a formalized reaffirmation of their friendship. Their wives, Bergthora and Hallgerd, the real disputants, continued to fight; within a year Brynjolf [the killer of Njal's servant] was dead at Bergthora's [Njal's wife's] bidding" (p. 289).

At the risk of being labeled ethnocentric — a risk to anyone who suggests that the West may have progressed in the last one thousand years other than in techniques of oppression — I suggest that we have come a long way in domestic dispute resolution since Njal's day. If Miller wanted to refrain from making any normative judgments, that would be fine by me. But, particularly in his concluding chapter, he seems to be doing something else — burnishing his postmodernist credentials, establishing his political inoffensiveness, by denying that anything in his book should be thought to give aid and comfort to

libertarians, or to whiggish liberals, and even trying to redeem medieval Iceland for feminism by pointing out that the status of women was somewhat higher there than elsewhere in medieval Europe (p. 305).

I said Miller was "gesturing" in the direction of the historical and anthropological literature on dispute resolution and the postmodernist critique of Western thought, by which I meant to suggest that these bodies of theory play only an incidental role in his book. He plainly doesn't believe in the unintelligibility of other cultures. But the gestures have two bad effects. One is to complicate what is after all the simple and straightforward account that Miller wants to give us. The other is to deflect him from other scholarly approaches that might have helped him to tell an even more interesting story.

IV

The heart of the book is an account of how people keep greed and violence within bounds despite the absence of a state security apparatus. The essential restraining device is the threat of retaliatory violence by the potential victim,⁹ but to be a fully credible deterrent it requires that the victim have allies of some sort — otherwise there would be no (or very little) deterrent to murder. Hence the importance not only of kinship, but, as Miller also emphasizes, of rhetoric. Even kin may be reluctant to risk their necks on your behalf, so you have to be able to persuade (not prove: the factfinding procedures were not that developed). That is, you must be able to put the offender in the wrong in their eyes and demonstrate the importance of retaliation to the future security of the kin group. Kinship has a double (actually triple, as we shall see) significance in a system of revenge; it expands not only the ranks of the potential violators but also the range of potential targets. If *X* kills *Y*, *Y*'s family may decide to go after *X*'s brother rather than after *X* himself — maybe the brother is not as well protected as *X*. In other words, responsibility is collective ("joint and several," as the lawyers say); this in turn gives people an incentive to police their kin, lest a kinsman's misbehavior lead to retaliation against them rather than just against him. Miller also stresses, as have many other writers on feuds, the importance of a sense of honor. Shame, the reaction to being dishonored, helps overcome fear, making it more likely that a victim *will* retaliate if attacked or abused — and if he doesn't retaliate he will be easy game and the system of revenge will fail to keep the peace. Hence the importance of keeping score and the connection of the sense of honor with notions of exchange, balance, and reciprocity.

The difficulty with an economy of threats is that it is likely to be highly unstable, although there are counterexamples such as the nu-

9. "The continuance of good relations was assisted greatly by the fear of feud." P. 187.

clear balance of terror. Deterrence rarely works perfectly, so there will be some misconduct and therefore some retaliation, and each act of retaliation may be perceived by the original aggressor, or by his kin, as an act of aggression inciting retaliation against the retaliator. The feud is born, and it can spiral out of control. The incentive to form a group powerful enough to deter retaliation is therefore strong, and the competition to form such groups may result in a monopoly of force after all, and hence in the formation of a state. That this did not happen in Iceland for three centuries suggests that the Icelanders must have had norms or institutions that played the same role in the blood-feud system as graphite rods play in the core of a nuclear reactor: to slow down the chain reaction.

One was law. Legal judgments were not self-executing, and if the convicted defendant thumbed his nose at a judgment the plaintiff would have to rally his kin to enforce the judgment by force, much as if he had decided to retaliate directly against the defendant for whatever wrong had touched off their dispute. But, as Miller explains, a legal judgment might have enough suasive force to make it easier for the plaintiff to rally his allies and also easier for the defendant's potential allies to beg off, thus tending to isolate the defendant and so vindicating the plaintiff's decision to go to law rather than to fight (pp. 238-39). Miller also notes that the bilateral character of Icelandic kinship (Icelanders reckoned kinship through both the father and the mother, whereas in many societies kinship is figured only through the father and in a few only through the mother) made it more likely that a disputant would have kin on both sides of the dispute, and these kin caught in the middle were naturals to try to make peace between the disputants (p. 265). Arbitration was another method of mitigating the ferocity of feuds, although its utility, like that of law, was limited by the fact that a man who seemed too willing to litigate or compromise his disputes might get a reputation for being afraid to fight — might, thus, lose honor, and by doing so invite future aggression against himself.

Miller describes well this basic logic of a stable revenge system (stable in the sense that it doesn't either explode into anarchy or collapse into tyranny) and offers many illuminating illustrations of its operation, emphasizing the subtle rhetorical and strategic skills required to maneuver effectively in such a society as well as the norms and institutions that secured its stability. So far, so good. But I think he could have further enlarged our understanding of the Icelandic system, and of the problem of social order generally, with a more eclectic research strategy.

The legal system that Miller describes resembles that of classical Athens. There prosecutions even for such serious crimes as murder and treason were initiated and conducted by private persons ("de-

nouncers") and tried before panels of citizens chosen at random. There were no professional judges and no appeals. There were no lawyers as such, though orators such as Demosthenes hired themselves out to assist the litigants. Enforcement of judgments was by public officers, unlike the situation in Iceland; the panels of jurors were larger; and there were other differences between the two systems. But the parallels are striking — they include the heavy use of banishment as a sanction and a propensity to protracted and repetitive litigation by "feuding" factions — and there is an extensive literature on the operation of the Athenian system, including the role of forensic oratory, that Miller could have consulted with profit.¹⁰

The ancient Greek society that most resembles saga Iceland, however, is not Athens; it is the society depicted in the Homeric epics. (And there is the same problem, as in the sagas, of disentangling fact from fiction in works of imaginative literature.) Homeric society¹¹ has only rudimentary governmental institutions, and exhibits the same emphasis that we find in the sagas on revenge as the principle of social order. Some years ago I tried to extract the basic system of social order from the Homeric epics much as Miller does with the sagas.¹² But my approach to revenge, the feud, and related institutions and practices differs from Miller's in emphasizing the utility of economics as a tool for understanding the operation of a revenge system.¹³ Economics is also the approach used by David Friedman in his article on Iceland.¹⁴ Recently — too late (I assume) for Miller to have seen the work — an Icelandic economist has chimed in with an interesting explanation for the stability of saga Iceland's system of governance.¹⁵ There is an economic literature on other "stateless" regimes that have managed to maintain a modicum at least of social order, such as the mining communities that sprang up during the California Gold Rush at a time and in a place where government authority was essentially nonexistent.¹⁶

10. See, for example, 2 ROBERT J. BONNER & GERTRUDE SMITH, *THE ADMINISTRATION OF JUSTICE FROM HOMER TO ARISTOTLE* (1938), other references in my book, RICHARD A. POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* 110 n.57 (1988), and THOMAS C. BRICKHOUSE & NICHOLAS D. SMITH, *SOCRATES ON TRIAL* (1989).

11. By which I mean the society Homer depicted, not the society in which Homer (or whoever the author or authors of the Homeric epics were) lived.

12. Richard A. Posner, *The Homeric Version of the Minimal State*, 90 *ETHICS* 27 (1979), reprinted in RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 119 (1981).

13. See also Richard A. Posner, *Retribution and Related Concepts of Punishment*, reprinted in POSNER, *THE ECONOMICS OF JUSTICE*, *supra* note 12, at 207 and POSNER, *supra* note 10, at 25 ("Revenge as Legal Prototype and Literary Genre"). Recent work in the same vein includes Alan P. Hamlin, *Rational Revenge*, 101 *ETHICS* 374 (1991).

14. See Friedman, *supra* note 8. Miller cites this article, but only to show that libertarians have taken an interest in Iceland; he does not discuss it.

15. THRINN EGGERTSSON, *ECONOMIC BEHAVIOR AND INSTITUTIONS* 305-10 (1990), discussed *infra* text accompanying note 17.

16. See, e.g., ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE*

Economists are interested in incentives and hence in deterrence, and Miller himself recognizes the centrality of these factors to the social system of saga Iceland. He puzzles over the relation between honor and feud, but quickly recognizes that the key is deterrence: "honor is the ability to make others believe that you will indeed be tough the next time" (p. 303). Economics provides a lens for seeing the forest rather than just the trees. Honor, feud, reputation, balance, exchange, reciprocity, legitimacy, power, rhetoric, and the other features of medieval Iceland that Miller describes are complex, elusive, and nuanced phenomena. But they can also be seen in a simpler, less variegated, less impressionistic light. Remove the coercive state (or fail to institute it in a new society, as happened in Iceland), and people still want to eat, and live, and reproduce, and this results in the cultivation of attitudes, demeanors, and values that maximize survival (broadly defined) in the stateless setting by creating an equilibrium based on, but also limiting recourse to, threats of violence. All this is clear enough but perhaps thin; the challenge to the economist is to explain the differences in attitudes, demeanors, and so on, and resulting differences in norms and institutions, across stateless societies.

The stabilizing and destabilizing features of a revenge system are particularly interesting because they explain why such a system lasts as long as it does last and why it collapses when it does. The system seems, as I have already suggested, inherently unstable because people have an incentive to form ever larger protective associations, whether based on kinship or on geographical propinquity, until at last one of them achieves a monopoly of force and the state is born. Economics helps us understand why this happened so slowly in Iceland. First, Iceland didn't have any significant foreign enemies — there were no threats of invasion until Norway began throwing its weight around toward the end. So the benefits of a large protective association were fewer than they otherwise would have been. Second, the country was very poor, which made it difficult for anyone to support an entourage of retainers, feudal-style, who in exchange for food and shelter would place an armed force at the disposal of their liege; lacking that armed force he had little to offer in the way of protection to other people in the society. This is to exaggerate some, since Iceland had chieftains, but the pitifully small forces at their disposal — a handful of relatives, dependents, and clients taking the afternoon off from farm work — limited their power to the execution of piecemeal revenge. None was able to offer a king's peace to the entire society.

In other words, a community needs an economic surplus to support specialists in coercion. Once the surplus appears, however, the stateless state's days are numbered. Eggertsson suggests that toward

the end of Icelandic independence the Church was able at last to collect a heavy tax yet unable to keep the bulk of the revenues out of the coffers of a handful of major chieftains. Six of them grew to the point where they could and did engage in civil war on a respectable scale, at which point the population was happy to turn to the King of Norway for protection and Icelandic independence ended.¹⁷

I mentioned Miller's penultimate endnote, in which he refers to game theory, the science of conflict and conflict resolution. He cites a single work by Robert Axelrod¹⁸ and explains that Axelrod had found in a series of computer games that the optimal strategy for achieving cooperation in a decentralized system is "tit for tat"; that is, if you act noncooperatively toward me, I'll retaliate in kind, but I won't escalate the retaliation. Miller gives Axelrod a polite brush off¹⁹ but concludes, "I am not a student of game theory, so the points I am making here may well have easy answers I do not know about" (p. 374). This won't do. Game theory is, as I said, the science of conflict and conflict resolution, so if you're going to write about that subject it behooves you to study the relevant science at least to the extent necessary to satisfy yourself that there is nothing in it that you can use.²⁰ Game theory can be forbiddingly mathematical, but it doesn't have to be, any more than economics has to be, and William Miller could learn the rudiments of game theory²¹ in a good deal less time than it took him to learn Old Icelandic.

Equipped with these complementary bodies of knowledge that I have noted, Miller will be poised to make even more important contributions to our understanding of law, Iceland, and social order in his future articles and books than he has made in the excellent book under review. And it is indeed excellent, though I have emphasized my areas of disagreement. And while making qualifications I should like to acknowledge that social science is not the only route to the understanding of human social behavior. Literature is another route, and the sagas are literature. But with all due respect for Professor Miller, he is not an author of literature, or even a translator of it; and though trained as a literary critic, he does not write as a literary critic. He writes as a social and legal historian, and in this role he could, I respectfully suggest, benefit from widening his scholarly horizons.

17. EGGERTSSON, *supra* note 15, at 309-10.

18. ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* (1984).

19. "Axelrod's analysis of computerized strategies for the Prisoner's Dilemma game is remarkably suggestive, but does not seem to be readily applicable to the Icelandic feud without considerable qualification." P. 374.

20. I say this who shouldn't, because I have written about conflict, too, without equipping myself with the rudiments of game theory.

21. See generally ERIC RASMUSEN, *GAMES AND INFORMATION: AN INTRODUCTION TO GAME THEORY* (1989). For pertinent applications to law, see ELLICKSON, *supra* note 16, at 296 (index entry for "game theory").

V

I end with a few comments on the genre of scholarship, and of scholar, to which this book and its author belong. In the brief period since Miller's book appeared, there have also appeared Professor Ellickson's study of extralegal dispute settlement,²² Professor Grey's study of the poetry of Wallace Stevens,²³ Professor Rosenberg's study of the effects of landmark legal cases,²⁴ and Professor Cohen's study of the legal and moral regulation of sexuality in ancient Athens.²⁵ Ellickson and Grey are law professors, Rosenberg is a political scientist, and Cohen, though law-trained, is the chairman of a department of rhetoric. These are all excellent books published by distinguished university presses despite what might appear to the pedantic to be, in each case, a mismatch between the author's professional credentials and his subject matter. Miller's book exhibits the same phenomenon, for he is a law professor and an ex-English professor writing Icelandic social history (law is by no means the principal focus of the book).

What is going on? This is the age of specialization. Were we not told by Max Weber almost a century ago that "[l]imitation to specialized work, with a renunciation of the Faustian universality of man which it involves, is a condition of any valuable work in the modern world"?²⁶

I think a number of things are going on:

1. The academic-legal market for books other than textbooks is small, in part because law professors, being habituated to excellent library facilities, are not natural book buyers. As a result university presses, which generally do not publish textbooks, are reluctant to publish law books that do not spill over into other fields. So spillover books are overrepresented in these presses' law lists.

2. Law teaching, because it is by academic standards well paid, undemanding, and noncompetitive, attracts a number of bright people whose true love is for a different subject. A fraction of these turn out to be highly motivated scholars despite their having an easy berth.

3. Being subject rather than method, law is amenable to study by people in other disciplines, such as economics or political science or even literary criticism, or by lawyers employing the tools of those disciplines.

22. See ELLICKSON, *supra* note 16.

23. THOMAS C. GREY, *THE WALLACE STEVENS CASE: LAW AND THE PRACTICE OF POETRY* (1991).

24. GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991) (reviewed in this issue by Professor Stephen L. Carter — Ed.).

25. DAVID COHEN, *LAW, SEXUALITY AND SOCIETY: THE ENFORCEMENT OF MORALS IN CLASSICAL ATHENS* (1991).

26. MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* 180 (Talcott Parsons trans., 1958).

4. Specialization begets a demand for generalists and interdisciplinarians. The proliferation of arcane subspecialties creates a space for bridge builders and translators who will meld approaches or turn them to problems outside the research paths of the specialist practitioners. Legal training is not the worst preparation for playing this role.

5. Most important I think, the rapid progress of the social sciences in recent decades, and the increasing emphasis on theory in fields such as literature and history that had for so long resisted it, have multiplied the opportunities for bringing other fields besides law itself to bear upon law. The result is a growing and improving interdisciplinary legal scholarship honorably represented by *Bloodtaking and Peacemaking*.

LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION. By Daniel A. Farber and Philip P. Frickey. Chicago: The University of Chicago Press. 1991. Pp. ix, 159. Cloth \$34.95; paper, \$13.95.

During the 1980s, concerned scientists warned that global warming would cause irreparable environmental damage unless the world community took immediate and massive corrective action.¹ Despite such dire predictions, U.S. policy has reflected the views of other, more cautious experts.² Recent administrations have refused to initiate government action to prevent global warming until scientists develop consistent conclusions through continued study of the problem. Advocates of this approach assert that while global warming might have severe environmental consequences, a hasty overreaction to the threat could have even higher costs to society.³

In *Law and Public Choice: A Critical Introduction*, Professors Daniel A. Farber and Philip P. Frickey⁴ advocate a similar "wait and see" response to public choice theory, a scholarly movement with equally troubling implications. Public choice theory is "the application of economics to political science."⁵ George Mason University's James M. Buchanan received the 1986 Nobel Prize in Economics for his pioneering work in the area.⁶ Buchanan's Nobel Prize increased the awareness of public choice theory among legal scholars. Consequently, since 1986, public choice scholarship has exploded within the legal community,⁷ raising a host of questions about the efficacy of

1. See, e.g., Philip Shabecoff, *Global Warming Has Begun, Expert Tells Senate*, N.Y. TIMES, June 24, 1988, at A1 [hereinafter Shabecoff, *Global Warming*]; Philip Shabecoff, *The Heat Is On — Calculating the Consequences of a Warmer Planet Earth*, N.Y. TIMES, June 26, 1988, § 4, at 1. See generally MICHAEL OPPENHEIMER & ROBERT H. BOYLE, *DEAD HEAT* (1990) (providing an overview of the global warming problem).

2. See Shabecoff, *Global Warming*, *supra* note 1. Note that scientists still debate the expected magnitude of the greenhouse effect today. See Bob Davis, *In Rio, They're Eyeing Greenhouse Two-Step*, WALL ST. J., Apr. 20, 1992, at A1 ("[W]hether temperatures will rise that much and when are the subject of brawls at scientific conferences.").

3. See Philip Shabecoff, *Bush Asks Cautious Response to Threat of Global Warming*, N.Y. TIMES, Feb. 6, 1990, at A1; see also OPPENHEIMER & BOYLE, *supra* note 1, at 62.

4. Professors Farber and Frickey both teach at the University of Minnesota Law School. *Law and Public Choice: A Critical Introduction* draws heavily on three previous collaborative articles by the authors. See Daniel A. Farber & Philip P. Frickey, *Integrating Public Choice and Public Law: A Reply to DeBow and Lee*, 66 TEXAS L. REV. 1013 (1988); Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEXAS L. REV. 873 (1987); Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423 (1988).

5. P. 7 (quoting DENNIS C. MUELLER, *PUBLIC CHOICE* II 1 (1989)).

6. Buchanan coauthored perhaps the seminal work in the field, JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* (1962). See Robert D. Tollison, *Public Choice and Legislation*, 74 VA. L. REV. 339, 340-41 (1988).

7. See, e.g., *Symposium on the Theory of Public Choice*, 74 VA. L. REV. 167 (1988). It is not surprising that legal scholars, especially those with a law and economics bent, have pursued public choice with a vengeance. In a recent article, Professor Robert Ellickson suggested that

American government.⁸

The book's subtitle — *A Critical Introduction* — accurately portrays what Farber and Frickey intend to accomplish. In a format accessible to readers unfamiliar with the intricacies of political economy, the book concisely introduces the two major strands of public choice theory.⁹ At the same time, it critically assesses the theory and the applications of the theory to public law proposed by the existing scholarship. The authors reject the claim that the results of preliminary public choice research justify making dramatic shifts in government policy. Instead, they argue that if continued inquiry confirms the preliminary findings, public choice theory might, in time, lead to some promising applications (p. 6).

I. PUBLIC CHOICE THEORY

As developed in Chapter One, the first and foremost tenet of public choice theory challenges the traditional assumption that government operates in the public interest. Instead, public choice theory views the policymaking process as a battlefield where legislators, bureaucrats, interest groups, and individual voters compete to maximize their own private interests.

A common method of public choice analysis is to hold constant the behavior of three of these competing groups and then to consider the incentives influencing the remaining group's maneuvers. For example, some public choice scholars have focused on welfare maximization of legislators by holding the behavior of the other political actors constant. Farber and Frickey recognize that politicians need to raise money and remain popular to keep their jobs and thus accept the public choice argument that the pursuit of reelection exerts a strong influence on legislative decisionmaking (p. 24).

A legislator may stay popular by providing two distinct services to her constituents (p. 22). First, she can tailor her voting behavior to the wishes of the majority of her constituents.¹⁰ Similarly, she can introduce legislation to protect and promote her constituents' general interests. Second, she can act as a liaison between individual constituents and federal agencies. She — or more correctly her staff — might, for example, intervene with the Social Security Administration to assist a constituent in receiving his check.

law and economics research has begun to reach a point of diminishing returns. Robert C. Ellickson, *Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law and Economics*, 65 CHI.-KENT L. REV. 23, 26 (1989).

8. The authors might have put this recent history in perspective by including a brief discussion of the historical development of public choice theory. Tollison, *supra* note 6, at 339-41, includes such a discussion.

9. In fact, a reader with a strong background in political economy or in legal process might not find the book very useful. The authors did not address the book to this audience.

10. More precisely, she can vote in a way that will maximize her expected number of votes.

Underlying this view of the behavior of legislators is the assumption that constituents will perceive continuation of these services to be in their own economic interest and will rationally respond by voting accordingly. However, Farber and Frickey assert that actual voting behavior is not entirely consistent with this assumption and that voters do not always act rationally in their own self-interest. In fact, truly rational self-interested citizens would not vote at all because voting is costly and, according to the authors, produces no visible benefits (p. 26). It poses a free-rider problem (p. 24), and, after all, no election is ever decided by a single vote. The authors propose instead that civic duty motivates citizens to vote (p. 27).

Note, though, that two arguments support the view, dismissed by the authors, that voting is consistent with the rational self-interest model. First, as stated by Professor Dwight R. Lee,

[P]eople receive satisfaction from participating in processes they feel are important, from supporting things they believe are good, and from opposing things they believe are bad. People are motivated to go to the polls and vote for much the same reason they are motivated to go to the sports arena and cheer.¹¹

Second, even if one accepts the authors' view that ideology plays a role in voting (p. 27), one can argue that voting based on ideology is consistent with public choice. As Professor Lee suggests, voting provides constituents with a cheap way to express their preferences.¹² Voters will express their preference based on their knowledge about a candidate, which can be extremely limited. Consequently, they will vote for a candidate based on ideology and demeanor, which serve as readily discernible signals predicting how the candidate will act if elected.

In addition to or in lieu of serving her constituents, our legislator may also maintain her popularity through political advertising and promotion. Such activities, and the political consultants engaged to coordinate them, do not come cheap. Thus, legislators feel compelled to raise a great deal of money and at the same time avoid negative publicity. Special interest groups can provide legislators with money and with publicity (both good and bad). Consequently, public choice scholars ascribe great power to these groups.

Farber and Frickey do not subscribe to the dominant public choice view that the power of interest groups *necessarily* results in inefficient political outcomes out of sync with the public interest. Rather, they adopt a more cautious view that rent-seeking by interest groups poses a potential problem (pp. 33-37). Rent-seeking occurs when an interest group pursues an outcome which is economically beneficial to it but

11. Dwight R. Lee, *Politics, Ideology, and the Power of Public Choice*, 74 VA. L. REV. 191, 193 (1988).

12. *Id.* at 194-95.

will result in a net cost to society as a whole.¹³ A classic example of rent-seeking by special interest groups occurs when domestic producers seek trade protection from foreign goods.¹⁴ Such protection is economically inefficient because the costs incurred by consumers and others as a result of the protection exceed the economic gains to the domestic producers.¹⁵ In addition, the costly rent-seeking behavior itself generally serves no useful function.¹⁶

Farber and Frickey question the public choice premise that rent-seeking is necessarily undesirable because it is inefficient (p. 34). They argue that an economically efficient outcome is not necessarily socially desirable. For example, equity concerns might conflict with efficiency. Accordingly, the authors believe that "rent-seeking can be justified when it advances other social values."¹⁷

Farber and Frickey omit significant discussion of the public choice view of bureaucracy. Under this view, as advanced by George Stigler and others, bureaucrats build empires, maximize budgets, and take actions that protect their receipt of lucrative post-government employment.¹⁸ With the rise of the regulatory state, bureaucrats play an increasingly important role in developing and interpreting our public law. Consequently, even in the context of a concise introduction, Farber and Frickey's failure to include some discussion of the relationship between public choice and the bureaucracy weakens their work.

As we have seen, the first strand of public choice theory, the battlefield model, suggests that political outcomes may reflect private rather than public interests. In Chapter Two, the authors develop a second strand of public choice theory known as Arrow's Theorem, which suggests that political outcomes may not reflect dominant political preferences at all. Instead, political outcomes may be distorted by strategic behavior and the filtering of combinations of voter preferences through agenda-setting rules (pp. 38-40). As a result, outcomes may seem in-

13. Note that only some legislation is influenced by rent-seeking. If the cost of influence is greater than the perceived benefit, the interest group will not act. The degree to which rent-seeking pervades the legislative process is unclear. The authors take the position that "in presuming that statutes are normally the result of self-serving influence, the rent-seeking model is too cynical about the legislative process." P. 68.

14. ROBERT J. BARRO, *MACROECONOMICS* 530-31 (1984).

15. *Id.*

16. Special interest groups, however, may lower the cost to the legislator of gathering information upon which to base their legislative decisions. The interest groups presumably have an incentive to tell legislators at least partial truths in order to avoid discrediting themselves and losing any chance of influencing future legislation.

17. P. 35; see also Mark Kelman, *On Democracy-Bashing: A Skeptical Look at the Theoretical and "Empirical" Practice of the Public Choice Movement*, 74 VA. L. REV. 199, 226 (1988).

18. See, e.g., DWIGHT R. LEE, *FISCAL POLLUTION AND THE CASE FOR CONGRESSIONAL TERM LIMITS* 7 (Center for the Study of American Business Contemporary Issue Series No. 51, 1992) (discussing role of bureaucracy in promoting the growth of government spending); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971).

coherent. Farber and Frickey do a superb job of clearly communicating the intuition behind this complex material.

Notwithstanding the incoherence that Arrow's Theorem predicts for a democracy, American government exhibits some degree of both coherence and stability. The authors conclude, therefore, that classic republicanism creates a countervailing influence on our political system. They assert that, "[a]s compared with public choice, republicanism views the role of government as far more creative. Rather than mechanically processing preferences, government involves an intellectual search for the morally correct answer" (p. 44). Farber and Frickey seem to believe that neither public choice theory nor classic republicanism offers a complete description of the political process. Nevertheless, they conclude that several features of the political system's structure limit the incidence of the behavior predicted by Arrow's Theorem. For example, our strong two-party system facilitates preference accumulation through coalition building (p. 49). In addition, the separation of powers promotes stability. Ultimately, the authors reject the Arrowian view of democracy as a black box intended to produce strict majority rule. In sum, they state, "a viable democracy requires that preferences be shaped by public discourse and processed by political institutions so that meaningful decisions can emerge. Given this richer understanding of democracy, Arrow's theory holds fewer terrors" (pp. 61-62).

II. APPLICATIONS OF PUBLIC CHOICE

The second part of *Law and Public Choice* applies public choice theory both to identify defects in the American political system and to develop solutions to them. In Chapters Three and Four, Farber and Frickey discuss and largely reject sweeping reform proposals suggested by public choice scholars. Chapter Three responds to an argument made by Professor Richard Epstein and others that public choice theory provides persuasive justification for a return to active judicial review of federal and state economic regulation. Inherent in Epstein's argument is the public choice belief that government regulation cannot be presumed to further the public interest. Consequently, where a court can identify rent-seeking regulation, which by definition is economically harmful, it should strike down the regulation in order to protect the public interest (p. 67).

Farber and Frickey reject the revival of vigorous judicial review of economic regulation on three primary grounds. First, they find fault with the idea that rent-seeking behavior by interest groups is so pervasive and successful as to dictate political outcomes (p. 68). The authors believe that (1) rent-seeking occurs only where the cost of influence is less than the benefit, and (2) the cost to the interest group of exerting countermajoritarian influence increases as the cost to the

legislator of ignoring voter preferences increases.¹⁹ Consequently, in many situations, voter preferences rather than interest group preferences (as advanced through rent-seeking behavior) will predominate. As an example, the authors cite recent deregulation of several major industries as inconsistent with a pure rent-seeking model. In each episode of deregulation, the interests of diffuse consumers in increased competition prevailed over the special interests of the regulatory monopolists (p. 68).

A second problem is that this form of judicial review is potentially overbroad, reaching "legislation involving tariffs, defense contracts, public work projects, direct subsidies, [and] government loans" (p. 68). It would require substantive review of virtually all regulation and force the judiciary to function as a superlegislature. "[I]f taken seriously, [such review] would require much broader judicial review than even the *Lochner* Court ever contemplated" (p. 68).

Finally, Farber and Frickey argue that facilitating economic efficiency is not the only legitimate goal of government (p. 69). Government may also promote societal values such as "environmentalism, racial equality, [and] redistribution of income" (p. 69). Consequently, the authors suggest that effectuating other public values may justify inefficient legislation produced by rent-seeking behavior.

Chapter Four addresses the extent to which judges should rely on legislative history to interpret statutes. Traditionally, legislative history has been viewed as reflecting the intent of the enacting legislature. Public choice rejects the existence of such coherent intent. Justice Scalia and Judge Easterbrook argue that legislative history should play a very limited role in statutory interpretation. In most cases, they believe the language of the statute alone should control its interpretation (p. 90).

The authors concede that statutory language should often control, but they disagree with Scalia and Easterbrook's premise that courts should generally disregard legislative history (p. 102). They argue that sometimes one *can* divine a coherent legislative intent underlying a statute. In these instances, judges may find such intent useful in resolving statutory ambiguities. Farber and Frickey also reject the opposite extreme exemplified by judicial opinions that appear to treat committee reports (often prepared by youthful congressional staff members) as meriting the same weight of authority as the statutory language itself (pp. 98, 102).

The remainder of the book describes Farber and Frickey's views

19. The cost of ignoring voter preferences increases when the voters perceive legislation as important. For example, voters may have difficulty perceiving the importance of small changes in the tax code, and such changes are very susceptible to special interest group maneuvering. In contrast, a special interest group is less likely to prevail in areas where voter interest and understanding are high.

on the proper application of public choice to public law and identifies some modest reforms that could be implemented immediately. Finding that "what we do know about the legislative process is that ideology, economic interest, and legislative structures all play roles," but that "their relative importance is unclear and probably quite variable" (p. 116), Farber and Frickey are unwilling to embrace any theory which posits a consistently dominant role for any one of these elements. Instead, like many of the public choice theorists themselves,²⁰ they seek to employ the stabilizing aspects of public choice theory to facilitate the political system's ability to formulate responsive public policy (p. 117).

The authors want courts to enforce "structural and procedural constraints on those aspects of the democratic process that public choice suggests are most vulnerable to malfunction" (p. 117). To achieve this goal, Chapter Five suggests first that Congress should restrict the power of special interest groups by limiting campaign expenditures (p. 132) and strengthening political parties (p. 135). Second, courts should police delegation of legal authority to special interest groups (p. 136).

Finally, when interpreting the meaning of a statute, courts should use public choice theory to assist in determining the proper scope of legislative intent (p. 142). For example, public choice could help identify the likely institutional influences present at the time a statute was enacted. In turn, this could enable the court to determine whether the legislature considered a particular issue at that time or failed to because the parties affected lacked representation.

CONCLUSION

Law and Public Choice presents a thoughtful introduction to public choice theory. The reader will take away an understanding of most of public choice's major theoretical underpinnings. The second part of the book, in which the authors discuss how public law might incorporate the insights of public choice theory, is equally accessible. Public choice holds great promise for understanding and perfecting the polit-

20. See, e.g., Geoffrey Brennan & James M. Buchanan, *Is Public Choice Immoral? The Case for the "Nobel" Lie*, 74 VA. L. REV. 179 (1988). Professors Brennan and Buchanan argue that critics have gone too far in criticizing public choice's results and that further academic inquiry should not focus on extreme results but rather on "the normative exercise of investigating the incentive structures embodied in various institutional forms." *Id.* at 180. Rather than embracing the view that economic motives dominate political actors, public choice theorists, according to Brennan and Buchanan, reject the view that "political agents can be satisfactorily modeled as motivated solely to promote the 'public interest,' somehow conceived." *Id.* at 181. For an example of a critic who attacks public choice theory by setting up such a straw man, see Abner J. Mikva, *Foreword to Symposium on The Theory of Public Choice*, 74 VA. L. REV. 167 (1988).

ical process; however, Farber and Frickey make perfectly clear that we have a great deal to learn before drastic action is warranted.

— *William Dubinsky*